PLEA NEGOTIATION AT THE INTERNATIONAL CRIMINAL COURT: OPPORTUNITIES AND COSTS

by

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Declaration

By submitting this dissertation electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the sole author thereof, that reproduction and publication thereof by Stellenbosch University will not infringe any third party rights and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

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Abstract

The International Criminal Court (ICC) faces serious challenges in the delivery of its mandate including legal and procedural challenges, political challenges as well as challenges relating to the victim participation and reparation regime. Therefore, this dissertation examines the question of whether the ICC should implement a plea negotiation policy to mitigate some of the challenges it faces. In order to answer this question, three sub-questions are set out as follows: which of the challenges facing the ICC might be mitigated by the implementation of a plea negotiation policy; whether plea negotiation would fit into the legal and procedural framework of the ICC; and, which lessons might be learned from the practice of plea negotiations in national jurisdictions on one hand, and in the International Criminal Tribunals for the Former Yugoslavia and Rwanda on the other hand.

The dissertation concludes that the ICC should implement a policy of plea negotiation because it fits in the ICC's legal and procedural framework and it can help mitigate some of the legal, procedural and political challenges facing the ICC. Be that as it may, the limitations of the practice of plea negotiation are fully acknowledged. However, it is argued that, these limitations can be mitigated by paying attention to lessons learned from the law, policy and jurisprudence relating to plea negotiations in national jurisdictions and the preceding international criminal tribunals. All in all, the dissertation concludes that plea negotiation could be an important tool to increase the efficiency of trials and increase conviction rates while saving judicial resources at the ICC. Appendix A and B of this dissertation contain texts of proposed provisions on plea negotiation to be included in the Rome Statute of the International Criminal Court and the Rules of Procedure and Evidence, respectively.

Key phrases: International Criminal Court (ICC), Article 65 of the Rome Statute, challenges facing the ICC, plea bargaining, plea negotiation, guilty plea, plea agreement, admission of guilt, remorse, cooperation, International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal from Rwanda (ICTR)

Opsomming

Die Internasionale Strafhof (ICC) staar ernstige uitdagings in die lewering van sy mandaat in die gesig. Dit sluit in regs- en prosedurele uitdagings, politieke uitdagings sowel as uitdagings met betrekking tot die deelname van slagoffers en vergoeding aan slagoffers. Daarom ondersoek hierdie proefskrif die vraag of die ICC 'n pleitonderhandelingsbeleid moet implementeer om sommige van die uitdagings wat dit in die gesig staar, aan te spreek. Ten einde hierdie vraag te beantwoord, word drie subvrae soos volg uiteengesit: wat is die uitdagings wat die ICC in die gesig staar en wat met behulp van 'n pleitonderhandelingsbeleid aangespreek kan word; sal pleitonderhandeling in die wetlike en prosedurele raamwerk van die ICC inpas; en watter lesse kan geleer word uit die praktyk van pleitonderhandelinge in nasionale jurisdiksies aan die een kant, en in die Internasionale Strafregtelike Tribunale vir die voormalige Joego-Slawië en Rwanda, aan die ander kant.

Die proefskrif kom tot die gevolgtrekking dat die ICC 'n beleid van pleitonderhandeling moet implementeer omdat dit inpas by die ICC se wetlike en prosedurele raamwerk. Dit kan help om sommige van die wetlike, prosedurele en politieke uitdagings wat die ICC in die gesig staar, te versag. Hoe dit ook al sy, die beperkings van die praktyk van pleitonderhandeling word ten volle erken. Daar word egter aangevoer dat hierdie beperkings versag kan word deur aandag te gee aan lesse uit die regsraamwerke, beleide, en regspraak rakende pleitonderhandelinge in nasionale jurisdiksies en die genoemde internasionale strafregtelike tribunale. Die proefskrif kom dus tot die gevolgtrekking dat pleitonderhandeling 'n belangrike instrument kan wees om die doeltreffendheid van verhore te verhoog. Skuldigbevindings sal verhoog word terwyl die hulpbronne by die ICC meer ekonomies aangewend word. 'n Konsepteks oor pleitonderhandeling wat by die Statuut van Rome van die Internasionale Strafhof en die reëls van prosedure en bewysreg opgeneem moet word, is onderskeidelik in bylaes A en B tot hierdie proefskrif geformuleer.

Sleutelfrases: Internasionale Strafhof (ICC), Artikel 65 van die Statuut van Rome, uitdagings wat die ICC in die gesig staar, pleitonderhandeling, pleitverduideliking, pleitooreenkoms, skuldigpleit, berou, samewerking, Internasionale Strafregtelike Tribunaal vir die voormalige Joego-Slawië (ICTY), Internasionale Strafregtelike Tribunaal vir Rwanda (ICTR)

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Dedication

This doctoral thesis is dedicated to my mother, Winnie Awuor Nyar g'Omondi, whose ambition and thirst for knowledge inspires me to want to do more and be more.

List of Abbreviations

ASP - Assembly of States Parties

Ad hoc tribunals - International Criminal Tribunal for Rwanda and International Criminal Tribunal for the Former Yugoslavia

CAR – Central African Republic

ICC - International Criminal Court

ICTR - International Criminal Tribunal for Rwanda

ICTY - International Criminal Tribunal for the Former Yugoslavia

ICTY Statute - Statute of the International Criminal Tribunal for the Former Yugoslavia

ICTR Statute - Statute of the International Criminal Tribunal for Rwanda

ILC - International Law Commission

LRA - Lord's Resistance Army

LRV - Legal Representatives for Victims

MICT - Mechanism for International Criminal Tribunals

Nuremberg Tribunal - International Military Tribunal at Nuremberg

OTP - Office of the Prosecutor

ODPP – Office of the Director of Public Prosecutions (Kenya)

PTC - Pre-Trial Chamber

RoR - Regulations of the Registry

RPE - Rules of Procedure and Evidence

Rome Statute (RS) - Rome Statute of the International Criminal Court

RoC - Regulations of the Court

States Parties - States Parties to the Rome Statute

StPO - Strafprozessordnung (The German Code of Criminal Conduct)

TC - Trial Chamber

Tokyo Tribunal - International Military Tribunal for the Far East

TFV - Trust Fund for Victims

UPDF - Uganda People's Defence Force

UNSC - United Nations Security Council

UNGA - United Nations General Assembly

US - United States of America

VWU - Victims and Witnesses Unit

WWI - World War I

WWII - World War II

TABLE OF CONTENTS

CHAPTER 1: INTRODUCTORY CHAPTER

1.1 Background

The choice of this research topic was informed by a number of factors among them – my Master of Laws (LLM) research, the failure of the Kenyan cases at the International Criminal Court (ICC), as well as my work and experience at the ICC. The complexity of the proceedings at the ICC first became evident to me during my LLM research which examined *inter alia* the challenge the ICC faces with regard to international cooperation and judicial assistance under part 9 of the Rome Statute of the International Criminal Court (Rome Statute). The ICC has no enforcement mechanism of its own and therefore has to rely on the cooperation and assistance of states parties and international organisations in the collection of evidence and the arrest and surrender of suspects to the Court. My LLM research focused on some states parties' refusal to comply with the ICC request to arrest and surrender former President Omar al-Bashir of Sudan to the Court. Even though the ICC first issued a warrant of arrest against him in 2005, to date states have refused/neglected or were unable to surrender him to the ICC and the case against him has therefore hibernated.

Secondly, the challenges the ICC faced in the Kenyan cases regarding the collection of evidence, alleged political interference, and lack of state cooperation among others, also played a role in informing the choice of topic. Being Kenyan myself, and being an international lawyer with a specific interest and expertise in international criminal law, I closely followed the cases against the Kenyan President and Deputy President at the ICC. Because the Prosecutor was unable to present sufficient evidence, both Kenyan cases ended in a lose-lose situation. The ICC was unable to establish the historical truth behind the post-election violence or enforce international justice in fulfilment of its mandate; the accused persons still have the suspicion of crimes against humanity hanging over their heads and the possibility of being prosecuted afresh; and the victims received neither closure nor reparations. This lose-lose situation raises the question of whether it could have been remedied through compromise. I argued elsewhere that perhaps if the Prosecutor had entered into negotiation with the accused persons; where the accused persons would cooperate with the ICC and set aside funds for

reparation of victims in exchange for a deal consisting of charge or sentence reduction, the situation may have resulted in a win-win situation.[1]

Thirdly, during my work at the ICC I started considering plea negotiation as a potential remedy to some of the challenges facing the ICC. Since January 2015 till February 2018, I was part of the defence team of Mr Charles Blé Goudé at the ICC. During this time, I experienced first-hand how the proceedings are made lengthy by various procedural issues such as admissibility of evidence and complex disclosure procedures, just to mention a few hurdles, which increase the length of proceedings at the ICC. For this reason, I have come to appreciate how plea bargaining could be an instrumental tool for the ICC to address most procedural hurdles. During my work at the ICC, I also had the occasion to discuss the issue at length with experienced professionals, like Judge Christine van den Wyngaert, formerly at the ICC (Trial Chamber and later also Appeals Chamber), and Professor Geert-Jan Knoops, lead counsel for Mr Blé Goudé. Judge van den Wyngaert also has experience dealing with plea negotiation at the International Criminal Tribunal for the former Yugoslavia (ICTY), where she was a judge before her tenure at the ICC.

We discussed whether plea negotiation could be a useful tool at the ICC to save time and resources and to advance the truth-seeking mission of the Court. During these discussions, it became clear to me that plea negotiation may do away with, for example, the pre-trial phase of proceedings at the ICC, which can take a considerably long period of time. For instance, in the case of former President Laurent Gbagbo, the co-accused in the case I worked on, the pre-trial phase alone lasted 925 days, all of which former President Gbagbo spent in detention at the ICC.[2] We also discussed the case of Mr Momir Nicolić at the ICTY who entered a guilty plea and provided useful evidence which helped the ICTY establish the truth behind the Srebrenica massacre.

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[1] Phoebe Oyugi, 'Exploring the Concept of Plea Bargaining as a Potential Solution at the International Criminal Court: The Kenyan Cases' (*Culture and Human Rights*, 8 August 2016) <http://culture-human-rights.blogspot.nl/2016/08/phoebe-oyugi-case-manager-ble-goude.html>.

[2] See *The Prosecutor V. Laurent Gbagbo and Charles Blé Goudé*, Decision on Mr Gbagbo's Detention-Dissenting opinion of Judge Cuno Tarfusser, ICC-02/11-01/15-846-Anx, 10 March 2017. In para 10 of this decision, the dissenting judge argued that the accused ought to be provisionally released *inter alia* because his pre-trial detention had lasted much longer than that of other accused persons in the history of the ICC.

However, the judge in that case did not agree with the concept of plea negotiation and the accused was awarded a punitive sentence of 27 years in prison. During this discussion, I appreciated the limitations of plea negotiation, but nevertheless thought that its introduction at the ICC could be a necessary addition considering the complexity and length of the trials.

The second notable discussion I had on this topic was with Professor Geert-Jan Knoops, lead counsel for Blé Goudé who participated in plea negotiation at the International Criminal Tribunal for Rwanda (ICTR). Professor Knoops was the Counsel for Mr Michael Baragaraza, a former Rwandan official who was accused of complicity in the crime of genocide in Rwanda. Mr Baragaraza pleaded guilty, and with the assistance of his counsel, Professor Knoops, entered into a plea deal with the prosecution. The accused aided the prosecution by providing useful information and in return he received a reduced sentence of 8 years' imprisonment. Mr Baragaraza was later released in 2011 after having served three-quarters of his sentence, making him the first convicted person at the ICTR to benefit from an early release. One of the factors the President of the ICTR took into account in his decision for early release was the fact that Mr Baragaraza had entered a guilty plea.[3] From this discussion I appreciated how plea negotiation may accelerate proceedings, increase efficiency as well as save time and resources at an international criminal tribunal. I thought the ICC could benefit from the implementation of a similar procedural tool.

Lastly, from April – October 2019, I worked as a consultant for the United Nations Office on Drugs and Crime and part of my task in this capacity involved providing technical and expert support to the Office of the Director of Public Prosecutions (ODPP) in Kenya in developing Plea Bargaining Guidelines.[4] As discussed in detail in Chapter 4 of this dissertation, plea bargaining has a long history in Kenya but was previously not properly regulated. Therefore, these Guidelines were enacted to inform both internal and external stakeholders on the principles of plea bargaining and to guide practitioners in concluding plea agreements. Furthermore, these Guidelines were

[3] *The Prosecutor v Michel Baragaraza* (Decision on the Early Release of Michel Bagaragaza) ICTR-15-86-5 (24 October 2011) [15].

[4] Office of the Director of Public Prosecutions, 'Plea Bargaining Guidelines' <http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2018/47-CriminalProcedure_PleaBargaining_Rules_2018.pdf> accessed 29 March 2019.

developed to mitigate some of the challenges facing the criminal justice system in Kenya such as case backlog, overcrowded prisons, as well as the shortage of both human and financial resources, among others. The overall goal was to ensure criminal justice was dispensed in a quick and efficient manner and the ODPP decided that plea bargaining was one of the tools through which this goal would be achieved. This experience buttressed my research on this topic and informed my conclusion that plea negotiation may mitigate some of the challenges facing the ICC, in a similar fashion as in national jurisdictions such as Kenya.

Having worked at the ICC and experienced the considerable delays, procedural and other challenges the Court faces and having discussed the issue at length with professionals who have themselves been involved in plea negotiation, both at the bar and the bench, at the ICTY and ICTR, I believe that examining plea negotiation at the ICC is a research-worthy topic. Implementation of a plea negotiation policy at the ICC might be instrumental in mitigating some of the procedural challenges facing the Court as discussed below. For this reason, it is necessary to investigate not only the legal framework of the ICC but also the lessons learnt from the ICTY and ICTR as well as in national jurisdictions where plea negotiation is practised. This would be with a view to determining whether plea negotiation should be introduced at the ICC, and if so, how it should be implemented. Examining plea negotiation at the ICC will also be a continuation of my interest in exploring solutions to the general challenges facing international criminal justice.

1.2 Introduction to the research problem

1.2.1 Procedural law at the international criminal tribunals

As mentioned above, international criminal tribunals face various and significant challenges such as: complex and lengthy trials, expensive proceedings, difficulty in the collection of evidence, insufficient state cooperation, lack of effective participation in the proceedings by the affected communities, political interference, and interference with witnesses, among others.[5] Because of the important role played by international

[5] See generally Andraz Zidar and Olympia Bekou (eds), *Contemporary Challenges for the International Criminal Court* (British Institute of International and Comparative Law 2014); Ralph Zacklin, 'The Failings of Ad Hoc International Tribunals' (2004) 2 Journal of International Criminal Justice 541; Theodor Meron,

tribunals in the international justice arena,[6] the international community is understandably invested in attempts to mitigate these problems in the interest of international criminal justice. International criminal law is a dynamic, complex and interdisciplinary field of study and practice which requires continued research, especially focusing on international criminal *procedural* law – an aspect of international criminal law that often stands in the shadow of more prominent aspects such as the study of the core crimes,[7] or institutional and political developments affecting international tribunals.[8]

The aim of this doctoral research is to contribute to the body of knowledge in international criminal procedural law, in particular by exploring the concept of plea

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The Making of International Criminal Justice: A View from the Bench: Selected Speeches (OUP Oxford 2011) Chapter 11.

[6] Since 1919 to date, a number of international criminal tribunals have been established whose role has been to try perpetrators of international crime and to participate in peace building and reconciliation. See generally M Cherif Bassiouni, 'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court' (1997) 10 Harvard Human Rights Journal 11. In 2002 the International Criminal Court (ICC) was established, after many years of negotiations, as a permanent international criminal tribunal. Despite the controversies that surround the ICC, the fact that it has 122 states parties who continually contribute to its work in one way or another shows a high level of consensus on the contribution of international tribunals to the peace and justice agenda. See for example Max du Plessis, *The International Criminal Court That Africa Wants* (Institute for Security Studies 2010).

[7] Genocide, crimes against humanity, war crimes and aggression.

[8] See for example the "Expediting proceedings at the international Criminal Court" A report produced by an Advisory Committee comprised of the experts in international criminal and humanitarian law under the auspices of the War Crimes Research Office in June 2011 available at https://www.wcl.american.edu/warcrimes/icc/documents/1106report.pdf (accessed 27 May 2016); Roza Pati, 'ICC and the Case of Sudan's Omar Al Bashir: Is Plea-Bargaining a Valid Option,' (2008) 15 University of California Davis Journal of International Law and Policy 265; Hakan Friman, 'Cooperation with the International Criminal Court: Some Thoughts on Improvements under the Current Regime' in Federica Gioia and Mauro Politi (eds), *The International Criminal Court and National Jurisdictions* (Ashgate Publishing, Ltd 2008); Antoine Garapon, 'Three Challenges for International Criminal Justice' (2004) 2 Journal of International Criminal Justice 716; Vladimir Tochilovsky, 'Globalizing Criminal Justice: Challenges for the International Criminal Court' (2003) 9 Global Governance 291.

negotiation as a potential solution to some of the pertinent challenges facing international tribunals, particularly the ICC.

1.2.2 The genesis and architecture of the international criminal procedure of the ICC

The international criminal procedure of the ICC consists of a set of rules, principles and norms of unprecedented vertical and horizontal complexity.[9] "Vertical" in this context refers to the relationship between the ICC and states, whereas "horizontal" refers to the relationship between states. Due to this complexity, it is necessary to contextualise and to situate the issue of possible plea negotiation at the ICC within the relevant legal architecture.

The foundational documents, legal practice and jurisprudence of the *ad hoc* international criminal tribunals, from the International Military Tribunal at Nuremberg (Nuremberg Tribunal) to the ICTY and the ICTR, provided the drafters of the Rome Statute with valuable lessons and best practices to apply in the drafting process. This vast historical record, as well as the intricacies and complexities inherent in negotiating an international treaty to establish the world's first permanent international criminal court, informed the process of assembling the international criminal procedure of the ICC; a process that took more than ten years to complete.[10]

One of the unfortunate features of the ICTY and ICTR was the fragmented nature of their procedural laws. Indeed, lawyers practising at these tribunals have had to navigate a plethora of sources in order to gather the applicable law. In order to bring some order to the fragmented nature of the procedural law, and in order to fill any procedural gaps, the United Nations Security Council (UNSC) resolutions[11] that

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[9] Claus Kress, 'The Procedural Texts of the International Criminal Court' (2007) 5 Journal of International Criminal Justice 537, 543.

[10] Kress, 'The Procedural Texts of the International Criminal Court' (n 9) 537.

[11] UN Security Council, *Security Council resolution 827 (1993) [International Criminal Tribunal for the former Yugoslavia (ICTY)]*, 25 May 1993, S/RES/827 (1993), available at: http://www.refworld.org/docid/3b00f21b1c.html [accessed 20 March 2017] and UN Security Council, *Security Council resolution 955 (1994) [Establishment of the International Criminal Tribunal for Rwanda]*, 8 November 1994, S/RES/955 (1994), available at: http://www.refworld.org/docid/3b00f2742c.html [accessed 20 March 2017].

established the ICTY and the ICTR provided for considerable judicial leeway to promulgate what would become the Rules of Procedure and Evidence (RPE) of the two *ad hoc* tribunals. A number of Practice Directives supplemented the RPE. The RPE were amended on many occasions due to the dynamic nature of the *ad hoc* procedural regime. As Kress noted, such a practice "yields the advantage of quick adjustments to the often-novel intricacies of international criminal procedure" but, on the other hand, "to give such wide-ranging powers to participants in the proceedings, even if impartial, seems contestable as a matter of principle".[12]

The drafters of the Rome Statute thus wanted to avoid the fragmented and judge-made nature of the procedural law of the *ad hoc* tribunals. Of course, the Rome Statute, being a multilateral treaty dealing with a topic fraught with policy and legal complexities, contains many compromises, but the end-result is a much more conclusive procedural law.[13] The Rome Statute itself, however, is not the only source for the international criminal procedure applicable to the ICC. The other sources are: The Rules of Procedure and Evidence (RPE), the Regulations of the Court, the Regulations of the Registry, and further ancillary instruments on criminal procedure, drafted by the Assembly of States Parties (ASP), including international agreements with procedural elements. It is appropriate to briefly note the most important features of each of these sources, before returning to the topic at hand, namely the possible role of plea negotiation in the international criminal procedure of the ICC.

1.3 The sources of international criminal procedure of the ICC

1.3.1 The Rome Statute

The Rome Statute of the International Criminal Court (Rome Statute) is the treaty establishing the ICC and is therefore the primary legal text applicable at the Court. As mentioned above, the Rome Statute is a more comprehensive source of procedural law than the instruments establishing the *ad hoc* tribunals.[14] The Rome Statute establishes the Court, defines its relationship with the United Nations and outlines the legal status and the powers of the Court. Part two of the Rome Statute outlines the

[12] Kress, 'The Procedural Texts of the International Criminal Court' (n 9) 538.

[13] Kress, 'The Procedural Texts of the International Criminal Court' (n 9) 539.

[14] Kress, 'The Procedural Texts of the International Criminal Court' (n 9).

crimes under the jurisdiction of the Court, (which are war crimes, crimes against humanity, genocide and the crime of aggression) as well as the admissibility criteria and the applicable law. Furthermore, part three outlines the general principles of criminal law applicable at the Court which are also applicable in international tribunals as well as in most national jurisdictions around the world. The Rome Statute also provides for the composition and administration of the Court as well as the procedure to be followed during investigation and prosecution. Additionally, parts six and seven provide for the procedure to be followed at trial, the penalties that may be imposed by the Court upon conviction, as well as the appeal and revision procedure. Moreover, the Rome Statute provides for international cooperation and judicial assistance which states parties are under obligation to provide to the Court upon request. Cooperation of states also extends to the enforcement of sentences where the states parties play the role of accepting sentenced persons to serve their sentences within the territories of the states parties.[15] Cooperation and judicial assistance is vital to the proper functioning of the Court because the Court does not have enforcement mechanisms and relies entirely on the cooperation by states parties.

1.3.2 The Rules of Procedure and Evidence (RPE)

The Rules of Procedure and Evidence (RPE), adopted under Article 51 of the Rome Statute, is an instrument for the application of the Rome Statute and is adopted by two-thirds majority of the ASP. The RPE is read in conjunction with the Rome Statute and is subject to it. Amendments to the RPE can be proposed by States parties, judges acting by an absolute majority, or the Prosecutor. In case of urgent situations which are not provided for, Article 51 of the Rome Statute permits the judges by a two-thirds majority to draw up provisional rules which are applied until adopted, amended or rejected by the ASP. The RPE expound on the provisions of the Rome Statute and this is especially useful with regard to practices which were introduced for the first time at the ICC and which did not exist in preceding international criminal tribunals such as the participation of victims in the proceedings. In this regard, the RPE provides for the application for participation of victims, the extent of their participation at the trial, their

[15] Part 10 of the Rome Statute.

legal representation and reparation.[16] The RPE is secondary to the Rome Statute therefore in case of conflict between the two, the latter is to prevail.

1.3.3 Regulations of the Court

The Regulations of the Court are rules made by the judges in accordance with the Rome Statute and the RPE. Unlike the judges at the *ad hoc* international tribunals who had wider law making powers, the judges at the ICC have narrower powers to make rules. Article 52 of the Rome Statute permits judges to make rules for the "routine functioning" of the Court. However, as Kress points out, the Regulations are not limited to the internal functioning of the Court[17] and contain a wide range of provisions including the power of judges to modify the legal characterization of facts.[18] The Regulations of the Court contain detailed provisions applicable in the day to day running of the Court such as: the composition of the Court, regulations relating to all stages of the proceedings, the creation of list of counsel and legal assistants, victim participation and reparations, detention matters, cooperation by states parties and enforcement, as well as removal from office of the ICC staff and disciplinary matters.[19]

1.3.4 Regulations of the Registry

The Regulations of the Registry (RoR) are adopted by the Registrar who is the principal administrative officer of the Court and in charge of non-judicial aspects of the administration and servicing of the Court. The RoR are put in place in accordance with Rule 14 of the RPE to govern the operation of the Registry. These Regulations are entirely internal and deal with issues such as the storage of evidence, the recording and transcription of the proceedings, translations during proceedings, funding of defence counsel and victims' representatives as well as the complaint procedures for accused persons in ICC detention.

[16] Chapter 4, Section III of the RPE.

[17] Kress, 'The Procedural Texts of the International Criminal Court' (n 9) 540.

[18] Regulation 55 of the Regulations of the Court.

[19] Chapters 2-8 of the Regulations of the Court.

1.3.5 Regulations of the Office of the Prosecutor

The Regulations of the Office of the Prosecutor were adopted pursuant to Article 42 (2) of the Rome Statute and rule 9 of the RPE. They came into force on 23 April 2009 and their purpose is to govern the operations of the Office of the Prosecutor (OTP) in relation to its management and administration. Like the Regulations of the Registry, the Regulations of the Office of the Prosecutor are internal and contain rules governing the conduct of the OTP during the preliminary examination and evaluation of information, investigations, proceedings before the Chambers as well as trials and appeals.

1.3.6 Further ancillary instruments on criminal procedure, drafted by the ASP

Some of the ancillary instruments adopted by the ASP have a bearing on the procedural law at the ICC. These include: first, the Agreement on the Privileges and Immunities of the ICC which was adopted by the ASP on 9 September 2002 and came into force on 22 July 2014. This Agreement provides for functional immunity and privileges for the officials of the Court (the Prosecutor, the judges and the Registrar), as well as for counsel appearing before the Court (defence counsel, *amici curiae*, and counsel for victims and witnesses). Second, there is the Relationship Agreement between the ICC and the United Nations (UN) which defines the relationship between the two organizations in accordance with Article 2 of the Rome Statute. It is noteworthy that unlike the ICTY and the ICTR, which were part of the UN system, the Relationship Agreement acknowledges the ICC as an independent legal entity in a relationship with the UN. The Agreement provides *inter alia* for cooperation and judicial assistance which the UN may provide to the ICC, upon request, under Article 87 (6) of the Rome Statute.[20]

Third, the Headquarters Agreement between the ICC and the Host State was adopted pursuant to Article 3 of the Rome Statute to ensure smooth functioning of the Court within The Netherlands. The Headquarters Agreement provides *inter alia* for immunities and privileges necessary for the fulfilment of the functions of the Court as an institution with an international legal personality, for the officials of the Court as well as counsels appearing before the Court. Also noteworthy in the Headquarters

[20] Articles 15-20 of the Relationship Agreement between the ICC and the United Nations.

Agreement is the role of The Netherlands in providing pre-trial and trial detention facilities as well as facilities for sentenced persons who have not been designated to a state party to serve their sentences.

The fourth category is the Agreements on the Enforcement of Sentences with the ICC, which the ICC enters into with states parties pursuant to Article 103 of the Rome Statute. This Article states that “sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons”. The ICC enters into such Agreements with states which agree that the sentenced persons may serve their sentences in the respective states’ territories. For example, in January 2019 the ICC and the government of Georgia signed an Agreement on the Enforcement of Sentences which means that persons convicted by the ICC may serve their sentences in Georgia if so decided by the ICC and accepted by the Government of Georgia.

Lastly in this category, is the agreement between the ICC and a state party for the interim release of accused persons undergoing trial at the ICC into the custody of that state. For example, Belgium has signed such an agreement which entered into force on 10 April 2014 and permits the Court to provisionally release persons into the territory of Belgium upon the fulfilment of certain conditions set by the Chamber.

Apart from the above-mentioned agreements, there are other relevant documents which were adopted by the ASP such as the Code of Professional Conduct for Counsel (Code of Conduct) and Regulations of the Trust Fund for Victims (Regulations of the TFV). The Code of Conduct was adopted pursuant to Rule 8 of the RPE and deals with the professional conduct for all counsel appearing before the ICC such as defence counsel, counsel acting for states, *amici curiae*, and legal representatives for victims or witnesses. It provides *inter alia* for independence of counsel, professional secrecy and confidentiality as well as rules governing representation by counsel such as conflict of interest and counsel fees. It also sets up a disciplinary regime in case of misconduct by counsel. Secondly, the Regulations of the TFV are adopted pursuant to Article 79 of the Rome Statute, an Article which attempts to reconcile elements of restorative justice with retributive justice. While the Court prosecutes and punishes the perpetrators of serious crimes, the TFV provides assistance to victims and implements the Court’s reparation orders - and these two processes run concurrently. The

Regulations of the TFV provide for the establishment of a board of directors to manage the trust fund, the acquisition and use of funds as well as the activities and projects of the TFV.

1.3.7 Policy documents formulated by the judges

These are documents formulated by the judges to aid in the smooth conduct of contentious issues, encountered during the proceedings, which are often times not contemplated by the core legal texts. For example: guidelines of the interaction between the Court's organs and units with intermediaries[21] and the Chambers Practice Manual.[22]

From the foregoing, it is evident that the procedural law and related rules at the ICC are more robust, comprehensive and unprecedented in its uniqueness in comparison to preceding international tribunals. This is evidence of the development of a *sui generis* international criminal procedure that is different and separate from, though related to, national criminal procedures. This then necessitates the study of how plea negotiation, if introduced, would fit into this unique legal architecture at the ICC.

1.4 The law and practice on plea negotiation at international criminal tribunals

Plea negotiation is essentially a compromise which involves an agreement between the prosecution and the accused person, (and sometimes the judge or victim) where the accused admits wrong doing and/or provides other forms of cooperation in exchange for a reduced sentence or a reduced charge.[23] Although a policy of plea negotiation was introduced in other international criminal tribunals, notably the ICTY and the ICTR, it has not been introduced at the ICC.[24] The applicability of plea

[21] 'Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel Working with Intermediaries' <https://www.icc-cpi.int/iccdocs/lt/GRCI-Eng.pdf> accessed 16 February 2018.

[22] 'Chambers Practice Manual, February 2016' <https://www.icc-cpi.int/iccdocs/other/Chambers_practice_manual--FEBRUARY_2016.pdf> accessed 16 February 2018.

[23] Albert W Alschuler, 'The Changing Plea Bargaining Debate' (1981) 69 California Law Review 652.

[24] Kate Kovarovic, 'Pleading for Justice: The Availability of Plea Bargaining as a Method of Alternative Dispute Resolution at the International Criminal Court' (2011) 2011 Journal of Dispute Resolution 283.

negotiation before the ICC is therefore a necessary research topic. This is firstly because plea negotiation contributed to solving some of the procedural challenges facing the ICTY and ICTR and therefore should be explored in the context of the ICC. Secondly, the ICC system is different from that of the two *ad hoc* tribunals in many ways, two of which are relevant here. The first is that the ICC, unlike the *ad hoc* tribunals, allows for the role of victims as participants in the trial.[25] Secondly, unlike the *ad hoc* tribunals which found much of their procedural inspiration from the adversarial, Anglo-American common law system, the ICC system is by design an amalgam of common law and civil law attributes leading to a *sui generis* legal system.[26] The unique nature of this system may either undermine or promote the use of plea negotiation at the ICC. For that reason, drawing from the use of plea negotiation in the two *ad hoc* tribunals and in various national jurisdictions, the research will examine whether plea negotiation may fit into the structure of the ICC and whether it may contribute to mitigating some of the legal and policy challenges as well as challenges related to victim participation and reparations currently facing this institution.

The ICTY and ICTR employed plea negotiation with varying forms of complexity including charge bargaining and sentence bargaining, that is the reduction of charges and sentences respectively, by the prosecution in return for a guilty plea as well as cooperation by the accused persons.[27] This eventually led to the inclusion of Rule 62 *ter* of the ICTY RPE and Rule 62 *bis* of the ICTR RPE to regulate plea agreements at the ICTY and the ICTR respectively.[28]

It is noteworthy that, at first, the ICTY judges rejected the suggestion to introduce plea negotiation because it seemed to contravene the ideological foundation of the Court. The main argument presented in this regard was that the crimes which the ICTY was to deal with were so heinous that it would be wrong to enter into any form of bargain

[25] See Article 68 of the Rome Statute, see also T Markus Funk, *Victims' Rights and Advocacy at the International Criminal Court* (Oxford University Press 2015).

[26] See Colin T McLaughlin, 'The Sui Generis Trial Proceedings of the International Criminal Court' (2007) 6 The Law and Practice of International Courts and Tribunals 343.

[27] See discussions in chapter 5 of this dissertation. See also Nancy Amoury Combs, 'Copping a Plea to Genocide: The Plea Bargaining of International Crimes' (2002) 151 University of Pennsylvania Law Review 1.

[28] ICTY Rules of Procedure and Evidence IT/32/Rev. 43 as amended on 24 July 2009.

with the perpetrators.[29] However, faced with the realities of adversarial procedures, such as lengthy, complex and costly proceedings, and pressure from the United Nations Security Council (UNSC) to complete all their work by 2010, plea negotiation was introduced at the ICTY and ICTR.[30] At first it was practiced in an irregular and inconsistent manner because at the time of introduction, and before the inclusion of Rule 62 *ter* of the ICTY, there was no established framework for the application of plea negotiation in either of the two tribunals.[31]

The practice of plea negotiation at the ICTY and ICTR has been hailed by some as a practical method of increasing the speed and efficiency of proceedings, enhancing peace and reconciliation, and lowering the cost of proceedings, among others.[32] However, some scholars warn that if not properly applied, plea negotiation may result in "trading justice for efficiency,"[33] or an undue interference with the historical record of the conflict, or a challenge of the Courts legitimacy.[34] Besides, as one scholar noted, the claimed positive effect of plea negotiation on peace and reconciliation in post-conflict areas is not backed by sufficient empirical research.[35]

It is against the backdrop of the plea negotiation experience before the ICTY and ICTR that this research will focus on the possible implementation of this practice before the ICC. The legal experts and diplomats involved in the negotiation of the Rome Statute seemed to share the initial view of the ICTY judges that the crimes involved were so

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[29] See the speech of President Cassese in response to the proposal by the United States in Virginia Morris and Michael Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis* (Hotei Publishing 1995) 652.

[30] Combs, 'Copping a Plea to Genocide' (n 27) 145.

[31] Combs, 'Copping a Plea to Genocide' (n 27) 145..

[32] See generally Volkan Maviş, 'Why Should the International Criminal Court Adopt Plea Bargaining' (2014) 5 Inonu University Faculty of Law Journal 459. See also Janine Natalya Clark, 'Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation' (2009) 20 European Journal of International Law 415.

[33] Michael Scharf, 'Trading Justice for Efficiency - Plea-Bargaining and International Tribunals' (2004) 2 Journal of International Criminal Justice 1070.

[34] Regina E Rauxloh, 'Negotiated History: The Historical Record in International Criminal Law and Plea Bargaining' (2010) 10 International Criminal Law Review 739.

[35] Clark, 'Plea Bargaining at the ICTY' (n 32) 434.

serious that plea negotiation should not be permitted at the ICC.[36] However, the final version of the Rome Statute neither permits nor prohibits the exercise of plea negotiation. In fact, Article 65 of the Rome Statute allows "discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed," although such discussions are not binding on the Chamber. This therefore means that there is potential to introduce the concept of plea negotiation at the ICC without contravening the Rome Statute.

The ICC has experienced and continues to face similar challenges as those faced by the ICTY and ICTR, which necessitated the introduction of plea negotiation in the latter two tribunals. These include, first, the difficulty in obtaining evidence, which is illustrated by the premature termination of the cases against President Uhuru Kenyatta and William Ruto (of Kenya) in December 2014[37] and April 2016,[38] respectively. Second, the lack of state cooperation demonstrated by the refusal of a number of states parties to the Rome Statute to cooperate with the ICC by arresting and surrendering former President Bashir to the ICC when he visited their territories. This was despite the fact that the ICC issued two warrants of arrest against him and made numerous requests to states parties for cooperation.[39] Eventually, the ICC was forced

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[36] "The remark was made that, in view of the gravity of the crimes within the jurisdiction of the court, it would be inappropriate to permit plea bargaining." Summary Of The Proceedings Of The Ad Hoc Committee During The Period 3-13 April 1995, *Ad Hoc* Committee On The Establishment Of An International Criminal Court 3-13 April 1995, 21 April 1995 http://www.legal-tools.org/uploads/tx_ltpdb/doc19093.pdf (accessed 23 May 2016) para 95.

[37] *The Prosecutor v. Uhuru Muigai Kenyatta* (Decision on the withdrawal of charges against Mr Kenyatta) ICC-01/09-02/11-1005 (13 March 2015).

[38] The *Prosecutor v. William Ruto & Joshua Arap Sang* (Decision on Defence Applications for Judgments of Acquittal) ICC-01/09-01/11-2027-Red (5 March 2016).

[39] States Parties to the Rome Statute like Chad, Kenya, Malawi, South Africa, Uganda, Democratic Republic of Congo, Djibouti just to mention a few have failed to arrest and surrender President Bashir to the ICC despite the requests made to these states by the ICC when President Bashir visited their respective countries. Chad for example has hosted President Bashir in its territory over four times while ignoring the cooperation requests of the Court. See for example: *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad) ICC-02/05-01/09-109 (27 August 2010); *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the

to hibernate the case against former President Bashir because his arrest and surrender to the Court could not be secured.[40] Third, the length of trials which is exemplified by the fact that the ICC took nearly 10 years from the time it came into existence to complete its first case. Fourth, the cost of trials at the ICC is a contentious issue which is always a subject of discussion at the annual Assembly of States Parties (ASP) meetings where the budget of the ICC is consistently reviewed and reduced because of enormous pressure from states parties.[41] This is a non-exhaustive list of the challenges facing the ICC,[42] which plea negotiation might help resolve.

From the foregoing, it is clear that the ICC, like the preceding international tribunals, is in need of "alternative methods of case disposition, and plea negotiation seems an attractive means of avoiding the time-consuming, costly trials that otherwise must take place"[43] This, therefore, necessitates an exploration of plea negotiation as a potential solution to some of the challenges bedevilling the ICC. This discussion is especially relevant because the drafters of the Rome Statute contemplated discussions and agreements between the Prosecutor and the Defence in Article 65 of the Rome Statute.

1.5 Research question

The main question that the dissertation examines is: Should the ICC implement a plea negotiation policy to mitigate some of the (procedural and institutional) challenges

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Arrest and Surrender of Omar Hassan Ahmad Al-Bashir) ICC-02/05-01/09-151 (26 March 2013); *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-140 (13 December 2011).

[40] Agence France-Presse in Khartoum, 'Omar Al-Bashir Celebrates ICC Decision to Halt Darfur Investigation' *the Guardian* (14 December 2014) <http://www.theguardian.com/world/2014/dec/14/omar-al-bashir-celebrates-icc-decision-to-halt-darfur-investigation> accessed 28 May 2016.

[41] Niklas Jakobsson, 'The 2016 ICC Budget - More Money, More Problems?' (*Justice Hub*, 17 September 2015) <https://justicehub.org/article/2016-icc-budget-more-money-more-problems> accessed 28 May 2016; Niklas Jakobsson, 'ICC Budget Leaves a Lot to Be Desired' (*Justice Hub*, 1 December 2015) <https://justicehub.org/article/icc-budget-leaves-lot-be-desired> accessed 28 May 2016.

[42] For a further discussion of the challenges facing the ICC see Chapter 3 of this dissertation.

[43] Combs, 'Copping a Plea to Genocide' (n 27) 102.

facing it? The following sub-questions are related to the main question and addressing them will be a step towards providing answers to the main question:

a) Does the legal architecture of the ICC, which differentiates it from the *ad hoc* tribunals, support or undermine the introduction of plea negotiation?
b) What are the main challenges facing the ICC which may be mitigated by plea negotiation?
c) What lessons may be learnt from the application of plea negotiation in national jurisdictions, and how can these be applied at the ICC?
d) What lessons may be learnt from the application of plea negotiation at the ICTY and ICTR and how can these be applied at the ICC as an institution with a *sui generis* system?

1.6 Methodology

Methodology is informed by two important considerations:

a) The methodology *sui generis* of the developing international criminal procedure.

International tribunals are established either by way of UN Security Council resolutions or treaties, both which are products of negotiation among stakeholders, whether politicians, diplomats or legal experts, all from different legal backgrounds. Because of contributions from different criminal procedures, international criminal procedure can loosely be described as an amalgam of practices from, on one hand, the common-law system, which is adversarial in nature, and on the other hand, civil law practices which are inquisitorial in nature. Because of this complex melange, international criminal justice practitioners, who are from different legal backgrounds themselves, face difficulty in navigating the international criminal procedure. This gives rise to the need, as expressed by Groome, to "depart from a process that has been cobbled together from the adversarial and inquisitorial systems designed to achieve different aims," and to "merge different legal traditions to develop a single international criminal process".[44] Indeed, with the development of the Rome Statute and the RPE and the other

[44] Dermot M Groome, 'Re-Evaluating the Theoretical Basis and Methodology of International Criminal Trials' (2006) 25 Penn State International Law Review 791, 793.

documents forming part of the legal architecture of the ICC, which incorporate lessons learnt from the earlier international criminal tribunals, the development of a *sui generis* international criminal procedure is becoming evident.

The research therefore involves a comparative study of the legal architecture of the preceding international tribunals, primarily the ICTY and the ICTR, on one hand; and that of the ICC, on the other hand with specific reference to plea negotiation. The study also analyses the use of plea bargaining in these international tribunals with a view to borrowing from the best practices and learning from the challenges. A comparative analysis of the systems of the two *ad hoc* tribunals and that of the ICC has been employed with a view to devising a framework of plea negotiation that suits the ICC as a *sui generis* institution.

The research was primarily library-based. It relied on books, journal Articles, case reports from the ICTY, the ICTR and the ICC. The research also relied on core legal texts of the above-mentioned international criminal tribunals such as their constitutive statutes, the RPE, the Regulations of the Court and their *travaux preparatoires*, as well as treaties, historical records, reports among other sources. The research entailed the collection and analysis of relevant material from the indicated sources in order to arrive at a deeper understanding of how plea negotiation may fit into the international criminal procedure, with a specific focus on the ICC.

b) Legal comparative method

Even though international criminal procedure is a *sui generis* system, it continues to develop as it is informed by both adversarial and inquisitorial procedures from national jurisdictions. For this reason, the legal comparative method is still important, since lessons from national legal systems are still informing the development of international criminal law and procedure. The legal comparative method is vital as it permits scholars to immerse themselves in different legal regimes, compare and contrast the benefits and limitations of the various systems in order to gain a wholesome perspective on law.[45] The legal comparative method was used in order to learn from best practices

[45] Edward J Eberle, 'The Method and Role of Comparative Law' (2008) 8 Washington University Global Studies Law Review 451, 471.

from national jurisdictions where plea negotiation is used to varying degrees, namely: Kenya, South Africa, France and Germany.

The choice of these jurisdictions is justified by the fact that: one, the four jurisdictions have different legal cultures and are representative of the major legal systems globally; in that South Africa and Kenya are common law countries while France and Germany are civil law countries. This is particularly relevant because as stated above, procedural and substantive law at the ICC borrows from both the common law and civil law systems. This necessitates a study of plea negotiation and its variations in jurisdictions which practice the two legal systems. Secondly, Kenya, South Africa, France and Germany are all states parties to the Rome Statute, and therefore they are representative of the legal systems at the ASP. Furthermore, South Africa and Germany both played important roles in the drafting of the Rome Statute as members of the Like-Minded Group.

It is noteworthy that the dissertation also refers to literature involving plea bargaining in the United States of America (US), since it is widely recognised as the "home of plea bargaining."[46] It is so referred because the vast majority of cases in the US do not go to trial but are concluded through guilty pleas of the accused and cooperation with the prosecutor. Plea bargaining plays a prominent role in the criminal procedure of the US where it has been entrenched since the 1800s.[47] It has been the subject of numerous judicial opinions and scholarly debates, a study of which informed the introduction of the practice at the ICTY and ICTR.[48] Nevertheless, this dissertation did not study plea bargaining in the US in the comparative study since the US is not a state party to the Rome Statute, not a member of the ASP and the position taken in this dissertation is that the national drivers of procedural developments at the ICC should, as a matter of principle, mainly come from ICC states parties.

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[46] Gerhard Kemp, 'Alternative Measures to Reduce Trial Cases, Private Autonomy and "Public Interest": Come Observations with Specific Reference to Plea Bargaining and Economic Crimes' (2014) 25 Stellenbosch Law Review 425, 431.

[47] Kenneth Jost, 'Plea Bargaining: Does It Promote Justice?' (*The Plea Agreement Project*, 12 February 1999) <http://legaltechdesign.com/ThePleaAgreementProject/2014/03/31/plea-bargaining-does-it-promote-justice/> accessed 21 March 2017.

[48] Combs, 'Copping a Plea to Genocide' (n 27) 1–57.

Since the normative and policy considerations underlying the practice at the national level could inform the introduction of plea negotiation at the ICC, comparative analysis is vital to this research. The methodological framework thus consists of international and comparative components. On the one hand, a comparative analysis of the ICTY, ICTR and the ICC; and on the other hand, an analysis of the national criminal procedures of Kenya, South Africa, France and Germany as they inform the development of procedural and substantive law at the ICC. The research draws from the lessons learnt from the practice of plea bargaining not only in the *ad hoc* tribunals, but also in above-mentioned national jurisdictions where plea negotiation is practised with relative frequency.

1.7 Chapter outline

The challenges facing the ICC, some of which are explained above, give rise to the need to provide practical and workable solutions. Following the use of plea negotiation at the ICTY and ICTR, it is highly likely that the ICC may turn towards the practice with a view to remedying some of the problems it faces.[49] However, as stated by Rauxloh:

> "The ICC must not wait until an overwhelming caseload forces the courtroom actors to informally develop a practice of plea bargaining based on considerations of efficiency. Instead the Court should reflect *now* on the advantages and dangers of plea bargaining and design a procedure that safeguards not only the interest of defendants, victims and the international community but also the legitimacy of the Court itself."[50]

Indeed, it is ill-advised for the ICC to wait until the realities of international criminal trials and/or the pressure from the international community force it into adopting plea negotiation as was the case with the ICTY and ICTR. This, as has been seen in the *ad hoc* tribunals, leads to the application of this practice in a way that is uncertain and irregular. The foregoing therefore necessitates the urgent conduct of research on the

[49] See for example Scharf (n 33) 1080. In this article, Scharf, a severe critic of the use of plea bargaining at the ICTY, stated as follows "Yet, regardless of the validity of the justifications for its adoption, now that plea-bargaining has been employed by the *ad hoc* Tribunals, the precedent will undoubtedly prompt the permanent international criminal court and hybrid tribunals to adopt the practice as well."

[50] Rauxloh (n 34) 767.

use of plea negotiation in order to answer the questions of whether it should be adopted at the ICC, and if so, using what framework.

This dissertation is divided into six chapters as follows:

1.7.1 Chapter one

This Chapter is the introductory section of the dissertation and contains the background information to the study, the research questions and objectives, the methodology and the chapter breakdown.

1.7.2 Chapter two

Chapter 2 contains an in-depth analysis of the legal architecture of the ICC. This includes an analysis of the Rome Statute, the RPE, the Regulations of the Court, the Regulations of the Registry, and further ancillary instruments on criminal procedure, drafted by the ASP, including international agreements with procedural elements which have a bearing on the structure and criminal procedure at the ICC. The objective of this analysis is two-pronged: the first is to demonstrate the development of a *sui generis* international criminal procedure which is unique to the ICC; and the second is to aid in assessing, at the end of the dissertation, whether plea negotiation fits into the structural and procedural framework of the ICC.

1.7.3 Chapter three

This chapter discusses the main challenges facing the ICC which necessitates a study of plea negotiation as a potential solution. These challenges are divided into three main themes: one, the legal and procedural challenges, such as complexity of proceedings, disclosure issues, and lengthy proceedings; two, political challenges such as apparent bias against Africa, lack of state cooperation and political instrumentalization of the Court; and three, challenges relating to the victim participation and reparations regime at the ICC. The aim of this discussion is to examine some of the challenges facing the Court with a view to determining whether any of them may be remedied by the adoption of plea negotiation.

1.7.4 Chapter four

This chapter contains a comparative analysis of the practice of plea negotiation in national jurisdictions namely: Kenya, South Africa, France and Germany. Plea negotiation is generally seen as a common law practice; however, it has since been adopted in some civil law countries including France and Germany with modifications to fit the inquisitorial system. This chapter contains an analysis of the relevant criminal procedures of these four jurisdictions as evidenced by the relevant laws, the jurisprudence and academic literature. The justifications underpinning plea negotiation in the four justice systems are analysed as well as how plea negotiation is conducted in each of them. Since the ICC procedural law borrows from both civil law and common law practices, the goal of this analysis is to learn from the best practices and limitations in both systems and how these could inform the introduction of plea negotiation at the ICC.

1.7.5 Chapter five

This chapter contains a comparative analysis of the use of plea negotiation at the ICTY and the ICTR with the view to understanding whether/how this could be applicable at the ICC. As briefly discussed above, lessons from the ICTY show that plea negotiation, if properly applied, may shorten the length of trials, increase efficiency of proceedings and reduce costs. Furthermore, they may also contribute to the promotion of peace, justice and reconciliation in post-conflict zones. However, if not applied properly it may hinder reconciliation, and interfere with peace and justice processes, and it may lead to inaccurate historical record, among other challenges. The aim of this analysis, therefore, is to flesh out the best practices at the ICTY and ICTR which would be instructive to the ICC should it decide to adopt plea negotiation as a matter of policy and practice.

1.7.6 Chapter six

Chapter six answers the main research question: Should the ICC implement a plea negotiation policy to mitigate some of the (procedural and institutional) challenges facing it? This is answered in the affirmative. Drawing from the research conducted in the preceding chapters, this chapter finds that ICC should implement policy of plea negotiation for two reasons: that plea negotiation would mitigate some of the

challenges the ICC faces; and, the Court can learn from and adopt best practices from the ICTY and the ICTR as well as national jurisdictions. The chapter also concludes that plea negotiation is compatible with the legal framework of the ICC and that it is desirable to introduce it as a matter of law, policy and practice. However, it is noted that there is need for specific and more detailed provisions in order to sufficiently provide for plea negotiation. Therefore, the chapter draws from the lessons learnt at the *ad hoc* tribunals and national jurisdictions, to propose amendments to the Rome Statue and the RPE which would enable plea negotiation to fit into the *sui generis* legal framework of the ICC.

1.7.7 Chapter seven

Chapter seven contains the concluding remarks of the dissertation.

1.7.8 Appendices

At the end of the dissertation there are Appendices A and B which contains the text of draft provision on plea negotiation to be included in the Rome Statute and in the RPE, respectively.

This research contributes to the agenda of the ICC to deliver international criminal justice in a manner that is more efficient, speedy, cost-effective and which contributes to peace, justice and reconciliation. Furthermore, the research aims to spark debate around the topic and provide practical information to scholars, ICC practitioners as well as other stakeholders, to assist in the decision of whether/how to introduce plea negotiation at the ICC as a potential remedy to some of the challenges it faces. Should the ICC decide to incorporate the concept of plea negotiation, the research would contribute towards proposing a suitable framework which may cater to the unique needs of the ICC as an international criminal tribunal with a *sui generis* system.

CHAPTER 2: THE LEGAL FRAMEWORK OF THE ICC: DEVELOPMENT OF A *SUI GENERIS* INTERNATIONAL CRIMINAL PROCEDURE

2.1 Introduction

The road leading to the adoption of the Rome Statute of the International Criminal Court (Rome Statute) was long and arduous. The desire for the international prosecution of crimes under international law and against the international order can be traced back to the 15th Century.[51] However, the initial conceptualisation of individual criminal responsibility was only expressed in 1919 in the Versailles Peace Treaty (Versailles Treaty) which was signed by the Allied Powers[52] to, *inter alia,* try the leaders of the Central Powers[53] who had lost World War I (WWI).[54] Article 227 of the Versailles Treaty provided for the public arraignment of "William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties". However, the trial did not occur because the Emperor went into exile in the Netherlands which refused to extradite him.[55]

Later, in 1945, after World War II (WWII) the victorious powers[56] signed the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement) which established the International Military Tribunal at Nuremberg (Nuremberg Tribunal). [57] The purpose of the Nuremberg tribunal was to try the political and military leaders of Nazi Germany. The Charter of the International

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[51] Robert Christensen, 'Getting to Peace by Reconciling Notions of Justice: The Importance of Considering Discrepancies between Civil and Common Legal Systems in the Formation of the International Criminal Court' (2001) 6 UCLA Journal of International Law and Foreign Affairs 391, 395.

[52] These were predominantly Great Britain, France, Russia and Italy.

[53] Germany, Austria-Hungarian Empire, Ottoman Empire and Bulgaria.

[54] See articles 227-230 of Peace Treaty of Versailles <http://net.lib.byu.edu/~rdh7/wwi/versa/versa6.html> accessed 8 November 2017.

[55] Gerhard Werle, *Principles of International Criminal Law: 2nd Edition* (TMC Asser Press 2009) 1–4.

[56] United Kingdom of Great Britain and the Republic of Ireland, the United States of America, France and the Union of Soviet Socialist Republics.

[57] 'Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945' (8 August 1945) <http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf> accessed 31 January 2018.

Military Tribunal, annexed to the London Agreement, *inter alia* defined crimes under the jurisdiction of the Tribunal (crimes against peace, war crimes and crimes against humanity); provided for legal principles such as individual criminal responsibility and fair trial rights of defendants; and gave the Nuremberg Tribunal power to formulate its rules of procedure.[58] One of the London Agreement's most significant contributions to international criminal law was the principle of individual criminal responsibility - where apart from states, individuals can also be held liable for violations of international law.[59]

The second important post-war tribunal was the International Military Tribunal for the Far East (Tokyo Tribunal) of 1946, which was established to try Japanese leaders involved in WWII.[60] The Charter of the International Military Tribunal of the Far East was modelled after the Charter of the Nuremberg Tribunal.[61] The Charter of the Tokyo Tribunal repeats almost verbatim most of the provisions of the Charter of the Nuremberg Tribunal especially with regard to the jurisdiction of the Tokyo Tribunal, individual criminal responsibility, fair trial rights and the power of the Tokyo Tribunal to formulate procedural rules. The judgments of the Tokyo Tribunal further codified the principle of individual criminal responsibility which had been introduced by the Nuremberg Tribunal.[62]

However, both the Nuremberg and Tokyo Tribunals have been criticised for meting victor's justice because the victorious states in both WWI and WWII presided over the trials of the nationals of the losing states.[63] Despite this criticism, the Nuremberg

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[58] 'London Agreement' (n 57).

[59] David Weissbrodt, Joan Fitzpatrick and Frank C Newman, *International Human Rights: Law, Policy, and Process* (LexisNexis 2009) 507–518; Christian Tomuschat, 'The Legacy of Nuremberg' (2006) 4 Journal of International Criminal Justice 830.

[60] Special proclamation by the Supreme Commander tor the Allied Powers at Tokyo and International Military Tribunal for the Far East January 19, 1946 <http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf> accessed 8 November 2017.

[61] Weissbrodt, Fitzpatrick and Newman (n 59) 508.

[62] See discussion of this in William A Schabas, 'State Policy as an Element of International Crimes' (2007) 98 Journal of Criminal Law and Criminology 953, 982.

[63] For a comprehensive analysis of the trials and judgments of these two tribunals see Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford University Press 2008); Guénaël Mettraux, *Perspectives on the Nuremberg Trial* (Oxford University Press 2008).

Principles, which were also enforced at the Tokyo Tribunal, were codified by the International Law Commission (ILC) in 1950[64] and are now considered to be part of customary international law.[65]

Between 1948 to the early 1990s, although a number of treaties were adopted defining and prohibiting international crimes,[66] there was limited implementation of the same due to lack of political will resulting from the Cold War.[67] After the end of the Cold War, in 1993, the UNSC adopted Resolution 827 establishing the ICTY to try the crimes committed during the war in the Former Yugoslavia.[68] The Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute) contained a comprehensive set of substantive and procedural provisions, for example: the definition of the core crimes, composition and jurisdiction of the ICTY, sentences and enforcement as well as cooperation and judicial assistance of states.[69] There was also a separate document on the rules of procedure and evidence.[70] The provisions in the ICTY documents confirmed the development of international criminal law and were a step forward from the preceding Nuremberg and Tokyo Tribunals' Charters, which contained rudimentary and even legally questionable provisions.[71] Nevertheless, the

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[64] 'Summary Records of the Second Session' (1950) 1 Yearbook of the International law Commission 30–64 <http://legal.un.org/ilc/publications/yearbooks/english/ilc_1950_v1.pdf> accessed 31 January 2018.

[65] Werle (n 55) 7–9.

[66] For example the Convention on the Prevention and Punishment of Genocide adopted on 9 December 1948 and entered into force on 12 January 1951; the The Geneva Conventions of 12 August 1949; The Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977.

[67] Werle (n 55) 14.

[68] Resolution 827 of 1993 < http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf>.

[69] See Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute) <http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf> accessed 8 November 2017.

[70] Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia < http://www.icty.org/en/documents/rules-procedure-evidence> accessed 8 November 2017.

[71] Werle (n 55) 17.

ICTY framework gave judges wide law making powers, especially in relation to procedural aspects.[72]

Subsequently, in 1994, the UNSC established the ICTR, through Resolution 955, to try the perpetrators of the Rwandan genocide and other crimes under international law committed in 1994 in Rwanda. The Statute of the International Criminal Tribunal for Rwanda (ICTR Statute) adopted the rules of procedure and evidence in force at the ICTY.[73] Therefore, the ICTY and the ICTR were similar in many ways – for example, both had jurisdiction over the core crimes of genocide and crimes against humanity and violations of the Geneva Conventions.[74] Similarly, they had the same structure and procedure as well as the same Appeals Chamber.[75] Both tribunals were *ad hoc*, therefore, the ICTR closed on 31 December 2015[76] while the ICTY closed on 21 December 2017 after delivering the judgment in the *Mladic* case.[77] Foreseeing the closure of these *ad hoc* tribunals, the UN set up the Mechanism for International Criminal Tribunals (MICT) on 22 December 2010 to perform the residual functions of both the ICTR and the ICTY, including supervision of enforcement of sentences, appeals, and the protection of victims and witnesses.[78]

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[72] Article 15 of the ICTY Statute provides that the judges of the ICTY shall have the power to formulate the rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, and the protection of victims and witnesses.

[73] Article 14 of ICTR Statute.

[74] It is noteworthy that while the ICTR had jurisdiction over violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II, the ICTY had jurisdiction over grave breaches of the Geneva Conventions and the violations of the laws or customs of war. See article 4 of the ICTR Statute and articles 2 and 3 of the ICTY Statute respectively.

[75] For a comparison of these tribunals see Lilian Barria and Steven Roper, 'How Effective Are International Criminal Tribunals? An Analysis of the ICTY and the ICTR' (2005) 9 The International Journal of Human Rights 349.

[76] 'ICTR Hosts Closing Events | United Nations International Criminal Tribunal for Rwanda' <http://unictr.unmict.org/en/news/ictr-hosts-closing-events> accessed 9 November 2017.

[77] 'ICTY Closing Ceremony - 21 December 2017, The Hague | International Criminal Tribunal for the Former Yugoslavia' <http://www.icty.org/en/features/icty-legacy-dialogues/icty-closing-ceremony-21-december-2017-the-hague> accessed 31 January 2018.

[78] 'About the MICT' (*United Nations Mechanism for International Criminal Tribunals*, 22 August 2013) <http://www.unmict.org/en/about> accessed 31 January 2018.

Apart from these *ad hoc* international tribunals, there are also hybrid tribunals, which have both international and national features, and which are typically established by the United Nations in collaboration with the relevant states. These include, Kosovo Specialist Chambers and the Specialist Prosecutor's Office,[79] the Special Court for Sierra Leone,[80] Special Tribunal for Lebanon,[81] the Panels with Exclusive Jurisdiction over Serious Criminal Offences in East Timor,[82] the Extraordinary Chambers in the Courts of Cambodia,[83] and the Extraordinary African Chambers.[84] These tribunals were established to try crimes within a limited territorial and temporal jurisdiction.[85] These tribunals have however, not had much influence on the procedure and jurisprudence at the International Criminal Court (ICC), perhaps due to their peculiar hybrid nature.[86]

The *ad hoc* tribunals with limited jurisdiction demonstrated the necessity of establishing a permanent international criminal court with global reach to try international crimes.[87] This culminated in the establishment of the ICC through the adoption of the Rome

[79] 'Law on Specialist Chambers and the Specialist Prosecutor's Office' <http://www.kuvendikosoves.org/common/docs/ligjet/05-L-053%20a.pdf> accessed 31 January 2018.

[80] 'Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone' <http://www.rscsl.org/Documents/scsl-agreement.pdf> accessed 31 January 2018.

[81] 'Statute of the Special Tribunal for Lebanon' <https://www.stl-tsl.org/en/documents/statute-of-the-tribunal/223-statute-of-the-special-tribunal-for-lebanon> accessed 31 January 2018.

[82] 'Regulation No. 2000/15 On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences of 6 June 2000' <http://www.un.org/en/peacekeeping/missions/past/etimor/untaetR/Reg0015E.pdf> accessed 31 January 2018.

[83] 'Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea' <https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf> accessed 31 January 2018.

[84] 'Statute of the Extraordinary African Chambers' <https://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers> accessed 31 January 2018.

[85] See Linda E Carter and Fausto Pocar (eds), *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems* (Edward Elgar 2013) 1–6.

[86] Werle (n 55) 26–27.

[87] See discussion of this in Bassiouni (n 6).

Statute on 17 July 1998 which entered into force on 1 July 2002.[88] The drafters of the Rome Statute took from the major legal systems of the world as well as best practices from the *ad hoc* international tribunals to formulate the structure and procedural law of the ICC. The result of this has been the development of a *sui generis* international criminal procedure which is the focus of this chapter. This chapter provides the foundation to one of the key research questions of this dissertation, namely whether plea negotiation would fit into the philosophical, structural and procedural framework of the ICC.

This chapter consists of five parts including this introduction. Part two deals with the philosophical underpinning of the ICC – why was established and what is its mission? It discusses the negotiating and drafting history of the Rome Statute which demonstrates that the Rome Statute was a result of both political and legal compromises. Part two concludes that, apart from trying the persons most responsible for the most serious international crimes, the ICC was also established to foster international peace, and to give a voice and reparations for victims. Furthermore, the ICC embodies universal values shared by all of humanity. Part three deals with the structure of the ICC; that is, the organs of the Court and their respective roles as well as the parties and participants in proceedings at the ICC. This part puts emphasis on the *sui generis* role of victims as participants in proceedings at the ICC. Part four examines the procedural law at various stages of the proceedings at the ICC, for example: investigation, pre-trial, trial, sentencing enforcement and victim reparation. Part five contains the concluding remarks for this chapter.

The objective of this analysis is two-pronged: the first is to demonstrate the development of a *sui generis* international criminal procedure which is unique to the ICC. The second is to aid in assessing whether plea negotiation fits into the structural, procedural and philosophical framework of the ICC.

2.2 Philosophical underpinning of the ICC

The ICC was established to foster international peace and justice (with the primary focus on justice), to put an end to impunity for the perpetrators of international crimes,

[88] The Rome Statute was open for signature on 17 July 1998 and came into force on 1 July 2002 after the ratification by 60 States parties as stipulated in article 126 (1) of the Rome Statute.

to help end conflicts (for example via the deferment mechanism), to mitigate the insufficiency of the *ad hoc* tribunals and to deter future perpetrators of international crime.[89] In this regard, it was meant to be more than a judicial institution but one which embodies the values shared by all humanity. While adopting the Rome Statute, the States Parties to the Rome Statute (States parties) were "conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time."[90] The ICC was therefore established to help prevent this "delicate mosaic" from shattering and to contribute to the "humanization of our civilization."[91]

Cherif Bassiouni recounts that at one of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference) sessions, the delegates "burst into a spontaneous standing ovation, which turned into rhythmic applause that lasted close to ten minutes. Some delegates embraced one another, and others had tears in their eyes."[92] He added that it was "one of the most extraordinary emotional scenes ever to take place at a diplomatic conference".[93] The Rome Conference had the highest number of state participation of all United Nations codification conferences which shows the importance of the subject matter and the support it enjoyed from the international community.[94] Furthermore, the

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[89] See also 'Establishment of an International Criminal Court - Overview' <http://legal.un.org/icc/general/overview.htm> accessed 24 October 2017.

[90] Preamble of the Rome Statute of the International Criminal Court.

[91] 'Cherif Bassiouni, Speech at Rome Ceremony July 18, 1998' <http://mcherifbassiouni.com/wp-content/uploads/MCB-Rome-Speech-18_July_1998.pdf> accessed 24 October 2017.

[92] Cherif Bassiouni, 'Negotiating the Treaty of Rome on the Establishment of an International Criminal Court' (1999) 32 Cornell International Law Journal 443, 459.

[93] Bassiouni (n 92) 459; see also John Washburn, 'The Negotiation of the Rome Statute for the International Criminal Court and International Law Making in the 21st Century' (1999) 11 Pace International Law Review 361, 361. He says there was an "international epiphany" on the day the Rome Statute was adopted and describes a similar emotional reaction of the delegates at the Rome Conference"

[94] Roy Lee, 'The Rome Conference and Its Contribution to International Law' in Roy Lee (ed), *The International Criminal Court: the making of the Rome Statute: issues, negotiations and results* (Martinus Nijhoff Publishers 1999) 9.

delegates of the Diplomatic Conference overwhelmingly voted for the adoption of the Rome Statute.[95]

2.2.1 The negotiating and drafting history of the Rome Statute

In 1948, the United Nations General Assembly (UNGA) through Resolution 260 invited the International Law Commission (ILC) to study:

> "[T]he desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions."[96]

The ILC determined that the establishment of such a judicial organ was both desirable and possible.[97] The UNGA then appointed a Committee which prepared a draft in 1951 and a revised draft in 1953 but this was never adopted. The issue continued pending with periodic discussions until 1993 when it was revived with the establishment of the ICTY.

In 1994, the ILC presented to the UNGA a draft statute establishing an international criminal court. Subsequently, the UNGA established an Ad Hoc Committee on the Establishment of the International Criminal Court (Ad Hoc Committee) to review the draft and consider the substantive and administrative issues arising therefrom. The Ad hoc Committee met twice in 1995, and in 1996 the UNGA established the Preparatory Committee on the Establishment of the International Criminal Court (Preparatory Committee) whose mandate was to produce a consolidated draft statute.[98] The Preparatory Committee met from 1996 to 1998 and prepared a draft which was submitted to the Rome Conference which occurred in June-July 1998. The Rome Statute was finalised and adopted on 17 July 1998. This was a significant step in the long journey, described above, towards prosecuting the perpetrators of international

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[95] The vote was won 121 to 7 with 21 states abstaining.

[96] 'A/RES/3/260 - Resolution Adopted by the General Assembly 260 (III) Prevention and Punishment of the Crime of Genocide' <http://www.un-documents.net/a3r260.htm> accessed 24 October 2017.

[97] 'Establishment of an International Criminal Court - Overview' (n 89).

[98] 'Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court' <http://www.un.org/law/icc/index.html> accessed 24 October 2017.

crimes and fostering international peace and justice.[99] The Rome Statute came into force on 1 July 2002 after ratification by 60 States Parties, a number that has doubled up to 123 states at the time of writing.[100]

2.2.2 The Rome Statute as a political compromise

Generally, negotiations on multilateral treaties on various subjects are often conducted by diplomats with no technical knowledge or experience in the specific subject matter of the treaty.[101] Therefore, many of the delegates who negotiated the Draft Rome Statute lacked technical knowledge or expertise in international criminal law, comparative criminal law, or comparative criminal procedure; and some delegates had no legal training whatsoever.[102] Besides, critical issues such as the trigger mechanism, the jurisdiction of the Court, the independence and role of the Prosecutor, as well as the role of the UNSC were discussed along political lines among states.[103] The views expressed during these discussions may be divided into two groups – on one hand, a group of states (which formed a coalition called the "like-minded states") pushed for a strong Court, with a broad and automatic jurisdiction on the territories of states parties, as well as an independent and powerful prosecutor who could initiate cases *proprio motu*, and a limited role of the UNSC.[104] On the other hand, a second group of states, the major one being the United States, wanted a weaker Court, with a prosecutor who had no independent powers to initiate investigations but had to rely on either UNSC or state recommendation.[105] The latter group also wanted a provision that a state had to consent on a case-by-case basis before the ICC could exercise jurisdiction on its territory.[106]

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[99] Bassiouni (n 6).

[100] 'The States Parties to the Rome Statute' <https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx> accessed 24 October 2019.

[101] Bassiouni (n 92) 460.

[102] Bassiouni (n 92) 460.

[103] Jay Goodliffe and Darren Hawkins, 'A Funny Thing Happened on the Way to Rome: Explaining International Criminal Court Negotiations' (2009) 71 The Journal of Politics 977, 979.

[104] Bassiouni (n 92) 457.

[105] Bassiouni (n 92) 457.

[106] Bassiouni (n 92) 457.

There were back-and-forth debates between these two groups of states based on their respective power relations leading to several political bargains.[107] In this regard, Goodliffe and Hawkins noted that during the Rome Statute negotiation "governments adopted the positions of the international partners on whom they depend for a diverse set of goods that includes trade, security, and foreign policy success in international organizations."[108] They describe a system where economically stronger states reward or punish economically weaker states which are dependent on them, based on the positions adopted by the latter towards a particular topic under discussion. Therefore, "leaders watch closely how other governments behave within their dependence network and alter their own actions accordingly."[109]

The signing of the Rome Statute was also marred with politics. Two examples suffice. The first being the Cotonou Agreement, signed between the European Union (EU) and the African Caribbean and Pacific group of states (ACP). [110] The Cotonou Agreement includes an ICC related provision requiring states to *inter alia* "take steps towards ratifying and implementing the Rome Statute and related instruments".[111] With this provision, the signing of the Rome Statute is tied to trade, cooperation, aid and development between the EU and the ACP countries. The result is that the ACP states which fail to sign and ratify the Rome Statute would, for example, lose millions of Euros in development funds and aid, among other consequences.[112] This was a significant monetary incentive for the ACP states to sign and ratify the Rome Statute.[113]

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[107] Emilia Justyna Powell and Sara Mitchell, 'The Creation and Expansion of the International Criminal Court: A Legal Explanation', *Midwest Political Science Association Conference* (2008) 6–7 <http://ir.uiowa.edu/polisci_pubs/3/>.

[108] Goodliffe and Hawkins (n 103) 977.

[109] Goodliffe and Hawkins (n 103) 977.

[110] The Cotonou Agreement signed on 23 June 2000 and revised on 23 June 2010 <http://www.europarl.europa.eu/intcoop/acp/03_01/pdf/mn3012634_en.pdf>accessed 15 October 2017.

[111] Article 11 (7) of the Cotonou Agreement.

[112] See discussion in David Hoile, *Justice Denied: The Reality of the International Criminal Court* (The Africa Research Centre 2014) 39–41. He discusses, for example, how Sudan failed to comply with this provision and the EU declined to release money meant for post- war development.

[113] Hoile (n 112) 39–41.

The second example is the bilateral agreements signed between the US and other states, including States Parties to the Rome Statute, obligating these states to refuse cooperation with the ICC in matters concerning the US, for example, the arrest and surrender of US citizens to the ICC.[114] These bilateral agreements contravene the obligation of States Parties to cooperate with the Court under part 9 of the Rome Statute. However, many States Parties signed these bilateral agreements with the US because, just like the Cotonou Agreement, there were incentives attached to it in terms of monetary or military aid.[115]

As shown above, States Parties made various political compromises during the negotiation of the Rome Statute so that whether a state supported a certain provision was sometimes based on politics rather than principle. Similar factors influenced and continue to influence states' decisions to sign and ratify the Rome Statute or States Parties' decisions to cooperate with the ICC.[116]

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[114] For example, 'American Service-Members' Protection Act' (30 July 2003) <https://2001-2009.state.gov/t/pm/rls/othr/misc/23425.htm> accessed 1 February 2018. See also the 'Nethercutt Amendment to the Foreign Appropriations Bill' (2004) <https://www.congress.gov/108/plaws/publ447/PLAW-108publ447.pdf.> accessed 1 February 2018

[115] Hoile (n 112) 40.

[116] This is illustrated, for example, by States Parties' response to the ICC request for the arrest and surrender of former President Bashir of Sudan to the ICC. Chad, for example, has been a State Party to the Rome Statute since 2007 and yet hosted former president Bashir in its territory five times after the ICC's request for his arrest and surrender. Interestingly in July 2009, when the African Union (AU) first made the decision not to cooperate with the ICC, Chad was the only country which entered a reservation to the decision, vowing to arrest former President Bashir in fulfilment of its Rome Statute obligations. At that time, however, there was political strife between President Déby of Chad and the then President Bashir. The conflict commenced in 2005 when the Chadian town of Adre was attacked, followed by an attempt to oust President Déby in 2006 both which former President Bashir was blamed for. Between the years 2005 to 2009 there was increased violence between Chad and Sudan, and many failed attempts to sign peace accords. It was in this context that Chad entered the reservation to the AU decision and indicated its intention to arrest former President Bashir. A final peace accord was signed in 2010 which saw the cessation of violence between the two countries. Subsequently, Chad disregarded its cooperation obligation to the ICC and invited and hosted former President Bashir five times despite repeated calls for cooperation from the ICC. This illustrates the influence of politics on States Parties' decision whether to cooperate with the ICC. For a detailed discussion of the influence of politics on African States Parties' cooperation with the ICC see Phoebe Oyugi, 'Head of State Immunity under the Rome Statute of the International Criminal Court: An Analysis of the Contemporary

2.2.3 The Rome Statute as a legal compromise

Apart from the above-mentioned political aspects, there were also legal compromises adopted during the negotiation and drafting of the Rome Statute. To begin with, many of the states' representatives at the *Ad hoc* and Preparatory Committees were lawyers or persons with legal training. Silvia Fernandez de Gurmendi (later a judge at the ICC) explains that while the Committee of the Whole dealt with "highly political issues" in one room, the Working Group on Procedural Matters, which she chaired, met in a separate room to discuss complex procedural issues such as investigation, trial and appeals.[117] She further adds that:

> "It was easy to agree in principle that a universal Court could not be perceived as favouring one legal system over the other and that it was therefore essential to find *suitable compromises between the main criminal justice systems*. This proved to be extremely difficult in practice. Suitable compromises required the willingness to make concessions in combining elements of different criminal justice systems. It was also necessary to ensure, at the same time, that the resulting procedural mechanisms and hybrid institutions would enable the Court to discharge its international functions effectively" (emphasis added).[118]

This was made worse by the fact that many of the delegates favoured their respective national legal systems and had not interacted with other systems.[119] Therefore, many delegations wrote lengthy proposals from their respective national criminal procedure viewpoints which the Working Group had to synthesise and consolidate. Many

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Legal Issues and the African Union's Response to the Prosecution of African Heads of State' (LLM Full Thesis, Rhodes University 2015) 90–121 <http://vital.seals.ac.za:8080/vital/access/manager/Repository/vital:21292;jsessionid=FAD3F411E7BA2622D49A394CA84959E6?exact=sm_title%3A%22Head+of+state+immunity+under+the+Rome+statute+of+the+International+Criminal+Court%3A+an+analysis+of+the+contemporary+legal+issues+and+the+African+Union%E2%80%99s+response+to+the+prosecution+of+African+heads+of+state%22>.

[117] Silvia Fernandez de Gurmendi, 'The Negotiating Process' in Roy Lee (ed), *The International Criminal Court: The Making of the Rome Statute--Issues, Negotiations, and Results* (1 edition, Springer 1999) 217.

[118] Fernandez de Gurmendi (n 117) 220.

[119] Fernandez de Gurmendi (n 117) 220; William A Schabas, 'An Introduction to the International Criminal Court' (*Cambridge Core*, February 2011) 249.

delegates saw only the advantages in the system in which they were trained and were, at first, not willing to compromise to allow the inclusion of other legal systems which were foreign to them.[120] After lengthy discussions and compromises, the result was a blend of the major criminal procedures of the world, mainly common and civil law; Islamic law, which is the third major legal system in the world, was ignored.[121] The Rome Statute is therefore made up of a *sui generis* procedure formed by blending common law and civil law procedures with best practices from the *ad hoc* tribunals and new innovative additions.[122]

2.2.4 Blend of civil law and common law in the Rome Statute

Civil law is traditionally based on a system of written codes which stems from the Roman Empire,[123] and later also heavily influenced by the unifying force of the Code Napoleon. It is now dominant in most of continental Western Europe, for example, France, Germany and Italy; and because of colonialism, it also spread to parts of Africa and Asia, and the whole of Central and South America as well as in some mixed common law/civil law enclaves such as Puerto Rico, Quebec, and Louisiana.[124] Common law, on the other hand, is traditionally made of royal decrees issued on a case-by-case basis which were applied to other cases under the principle of *stare decisis* (precedent).[125] It originated from the British Isles and, through colonialism, spread to parts of Africa, Asia, the United States of America, Canada and New Zealand among others.[126] Over the years, a bridge has been established between the two

[120] Fernandez de Gurmendi (n 117) 217–226.

[121] For a discussion of why Islamic law was ignored see Powell and Mitchell (n 107) 16–18. They argue that this was because: first, there is an acute difference between Islamic law and the law practiced in western states and this reduced the impact of Islamic law on the ICC. Secondly, during Rome Statute negotiations there were fewer delegates from Islamic states compared to civil and common law states therefore the later had lower bargaining power. Thirdly, Islamic states have always had a shaky relationship with international institutions especially international courts. Furthermore, Islamic law cannot be separated from Islam as a religion and therefore might create a problem for non-Muslim judges for example, strict Islamic law prohibits the judging of Muslims by non-Muslims.

[122] Carter and Pocar (n 85) 13.

[123] Powell and Mitchell (n 107) 9.

[124] Christensen (n 51) 399.

[125] Powell and Mitchell (n 107) 9.

[126] Christensen (n 51) 399.

systems and the differences are no-longer stark; for example, many common law countries now have written codes while civil law countries often rely on the principle of precedent.[127]

Despite this blend, the philosophical and practical differences between these systems persist. For example: the interpretative techniques applied to statutes or treaties; the role of judges in the proceedings; the rules of procedure and evidence; and criminal procedure - whether adversarial or inquisitorial, are all very different between the two legal systems. Examining the relationship between these legal systems, Christie concludes that:

> "Courts operating in different legal cultures can reach different conclusions on the same issue, not necessarily because they take a different view of the merits of the issue involved, but because they have a different view of the judicial function and/or utilize different judicial techniques."[128]

These two legal systems approach the fundamentals of the legal process differently and this is illustrated by the following two examples:[129]

First, in relation to the goal of proceedings, generally, in civil law systems the underlying justification of the trial is to find the ultimate truth, while common law is based more on resolution of conflict between the parties. This determines and explains the procedures adopted, for example in civil law systems the truth is arrived at by allowing the admissibility of all evidence available, while in common law systems, admissibility of evidence is tightly controlled to ensure fairness to the two opposing parties.[130]

Secondly, in relation to the control of proceedings, civil law proceedings are controlled by the judge and have been termed as "judge-centric", while common law proceedings are controlled by the parties, thus "party-centric".[131] This means that in civil law

[127] Christensen (n 51) 400; Carter and Pocar (n 85) 17.

[128] George C Christie, 'Some Key Jurisprudential Issues of the Twenty-First Century Essay' (2000) 8 Tulane Journal of International and Comparative Law 217, 224.

[129] Christensen (n 51) 401.

[130] Carter and Pocar (n 85).

[131] Carter and Pocar (n 85) 20.

jurisdictions, there is judicial involvement in investigations, a judge determines which witnesses to call, and a judge questions witnesses extensively while the prosecutor and defence may ask additional questions. On the other hand, in the common law systems, the parties conduct their own separate investigations, separately determine which witnesses to call to support their case and the judge is more of a passive decision maker or umpire.[132]

Despite the philosophical differences between these two systems, the ICC procedure is made up of a complex blend of civil and common law principles as well as customary international law and *sui generis* principles to form an unprecedented legal system.[133] After the drafting process, a lot of the provisions resulting from this amalgamation were unclear or sometimes contradictory and these were left to be clarified by the ICC's emerging jurisprudence.[134] Many aspects of the ICC procedural law illustrate this compromise therefore it is impractical to discuss all of them in this dissertation.[135] This chapter focuses on the major aspects of the key stages of the ICC procedural law, namely: investigations, pre-trial, trial, sentencing, appeal, sentence enforcement and victim reparation. To put the ICC procedural law in context, it is important to briefly discuss the structure of the Court, meaning the organs of the Court, the parties and participants as well as their respective roles.

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[132] Carter and Pocar (n 85).

[133] Michael A Newton, 'How the International Criminal Court Threatens Treaty Norms' (2016) 49 Vanderbilt Journal of Transnational Law 371, 374.

[134] See Shabtai Rosenne, 'Poor Drafting and Imperfect Organization: Flaws to Overcome in RS 40th Anniversary Conference Panel' (2000) 41 Virginia Journal of International Law 164. See also Bassiouni (n 6) 464–466. For example, while referring to part 3 of the Rome Statute which deals with the general principles of law, Bassiouni opines that:

> "Because common law, civil law, and other legal systems approach the mental element of crimes very differently, the drafters of Part 3 faced a significant challenge. While the drafters resolved some of the differences, in the interest of diplomatic compromise they left many others for ICC jurisprudence to settle."

[135] See for example Claus Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise' (2003) 1 Journal of International Criminal Justice 603.

2.3 The structure of the ICC

The ICC has four organs: The Presidency, the Chamber (Pre-Trial, Trial and the Appeals divisions), Office of the Prosecutor (OTP) and the Registry.[136] The Defence, which is formed by legal representatives of the accused, is a party to the proceedings, while the victims through their legal representatives are participants.

2.3.1 Organs of the Court

Presidency

The Presidency consists of the President, the First-Vice President and the Second Vice President who are appointed by an absolute majority of the judges.[137] They serve for terms of three years or until the end of their terms as judges, whichever comes first and are eligible for re-election once. The function of the Presidency is to deal with the proper administration of the Court, such as constituting Chambers and reviewing administrative decisions of the Registrar, but not those of the OTP.[138]

Chamber

The Chamber, which is responsible for the judicial functions of the ICC, is made up of 18 judges who are elected through secret ballot by the ASP from nominations presented by States Parties. The nomination and election of ICC judges is a very political and controversial process as explained below.

Article 36 (3) provides *inter alia* that:

> "The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.
>
> (b) Every candidate for election to the Court shall:

[136] See part IV of RS on the composition and administration of the Court.

[137] Article 38 of RS.

[138] Article 38 (3) of RS.

(i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or

(ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court."

Two lists are made during elections: list A consisting of candidates qualified under paragraph 3 (b) (i), and list B consisting of those qualified under paragraph 3 (b) (ii). During the elections process States Parties are to ensure that there are at least nine judges from list A and at least five from list B.[139] The voting of the judges at the ASP is by secret ballot. The persons elected are the 18 candidates, from lists A and B, who obtain the highest votes as well as a two-third majority of States Parties present and voting.[140] While electing judges, States Parties are required to take into account the representation of the principal legal systems of the world, equitable geographical representation and fair representation of men and women.[141]

Professors Ruth Mackenzie and Philippe Sands conducted a qualitative and quantitative study on the selection of judges to international criminal tribunals, including the ICC, and concluded that the process is often "strongly influenced by domestic and international political considerations and controlled by a small group of diplomats, civil servants, lawyers and academics."[142] Furthermore, this process is often marred with diplomatic "back-scratching", "canvassing" and "bargaining".[143] Mackenzie and Sands concluded that "vote-trading, campaigning, and regional politicking invariably play a

[139] Article 36 (5) of RS.

[140] Article 36 (6) of RS.

[141] Article 36 (8) of RS.

[142] Ruth Mackenzie and others, *Selecting International Judges: Principle, Process, and Politics* (OUP Oxford 2010) 65.

[143] Hoile (n 112) 99–114; 'Cosy Club or Sword of Righteousness?' [2011] *The Economist* <http://www.economist.com/node/21540230>; Afua Hirsch and legal affairs correspondent, 'System for Appointing Judges "Undermining International Courts"' *The Guardian* (8 September 2010) <http://www.theguardian.com/law/2010/sep/08/law-international-court-justice-legal> accessed 1 November 2017.

great part in candidates' chance of being elected than considerations of individual merit."[144] Some critics have gone so far as to say that "with a few exceptions the judges at the ICC have been lacklustre political appointees."[145]

There has been evidence of some States Parties putting pressure on other states, or providing "mutual support" or doing personal favours to the ASP delegates to secure votes for their nominees.[146] Many commentators, including scholars, [147] the ASP President,[148] as well as NGOs such as Human Rights Watch[149], Amnesty International and the Coalition for the International Criminal Court (CICC)[150] have strongly discouraged the practice of vote-trading during the election of judges. The type of political appointment which occurs in practice can interfere with the independence of the judges since their appointment is based on many political factors unrelated to their merit.[151]

Besides, it is noteworthy that Article 36(3)(b)(i) allows for the appointment of persons without prior judicial experience, while Article 36(3)(b)(ii) permits the appointment of persons not trained in law. This has led to the appointment of career diplomats, politicians, academics and activists, an issue which some scholars think has had devastating consequences for the development of the ICC procedural law.[152] This might cause an extra layer of complexity since the ICC procedural law is not only *sui*

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[144] Mackenzie and others (n 142) 172.

[145] Hoile (n 112) 99.

[146] Mackenzie and others (n 142).

[147] See discussion in Hoile (n 112) 99–114.

[148] 'The International Criminal Court: A Scandal Worse than FIFA' *Pressreader* (14 December 2015) <https://www.pressreader.com/swaziland/swazi-observer/20151214/281973196599407> accessed 1 November 2017.

[149] Human Rights Watch, 'Human Rights Watch Memorandum for the Thirteenth Session of the International Criminal Court Assembly of States Parties' (*Human Rights Watch*, 25 November 2014) <https://www.hrw.org/news/2014/11/25/human-rights-watch-memorandum-thirteenth-session-international-criminal-court> accessed 1 November 2017.

[150] 'The Nomination and Election of the ICC Registrar' (*Coalition for the International Criminal Court*, 2017)<http://www.coalitionfortheicc.org/sites/default/files/cicc_documents/cicc_registrar_election_memo_2017_final.pdf> accessed 1 November 2017.

[151] Sylvia de Bertodano, 'Judicial Independence in the International Criminal Court' (2002) 15 Leiden Journal of International Law 409.

[152] Schabas (n 119).

generis, but the drafters left the task of clarification of the Rome Statute to the judges.[153]

The Chamber is made up of the judges of Pre-Trial and Trial divisions which consist of not less than 6 judges each as well as the Appeals Division consisting of the President and four other judges.[154] The assignment of judges to the divisions is based on the specific functions of the respective divisions as well as the qualifications and experience of the judges. Each division should contain: "an appropriate combination of expertise in criminal law and procedure and in international law".[155] However, the Trial and Pre-Trial Divisions are composed predominantly of judges with criminal trial experience.[156]

The functions of the Trial-Chamber are carried out by three judges, while those of the Pre-Trial Chamber are carried out by three judges or a single judge depending on the provisions of the Rome Statute and the RPE.[157] The judges in the Trial and Pre-Trial Divisions serve in the respective divisions for three years and thereafter until the completion of a case which had already commenced in the division they are in.[158] Furthermore, the Rome Statute allows for the temporary attachment of the judges in the Pre-Trial Division to the Trial Division and vice versa, however a judge cannot be involved in both the trial and pre-trial stages of the same case. On the other hand, the judges in the Appeals Division serve only within the Division until the end of their term.[159]

The office of the Prosecutor

The Office of the Prosecutor (OTP) is a separate and independent organ of the Court which is responsible for receiving referrals and information about crimes under the jurisdiction of the Court, examining them and conducting investigations and

[153] Vladimir Tochilovsky, 'Proceedings in the International Criminal Court: Some Lessons to Learn from ICTY Experience' (2002) 10 European Journal of Crime, Criminal Law and Criminal Justice 268, 268.

[154] Article 39 of RS.

[155] Article 39 (1) of RS.

[156] Article 39 (1) of RS.

[157] Article 39 (2) of RS.

[158] Article 39 (3) and (4) of RS.

[159] Article 39 (3) and (4) of RS.

prosecutions.[160] The OTP is headed by a Prosecutor who oversees the management and administration of the Office and who is assisted by one or more Deputy Prosecutors. The Prosecutor is elected by secret ballot by the ASP and by an absolute majority. Similarly, the Deputy Prosecutors are elected by the ASP from a list of candidates provided by the Prosecutor. Both the Prosecutor and the Deputies hold office for nine years without the possibility of re-election. [161] The process of electing the Prosecutor faces similar political challenges as the election of judges explained above. Apart from being the organ in charge of prosecutions and investigations, unofficially, the OTP is also considered "the face of the Court", meaning the decisions and utterances of the Prosecutor are often the first contact of the public with the Court.[162]

Registry

The Registry is the organ responsible for the non-judicial administration and servicing of the Court. It is headed by the Registrar who is the principal administrative officer of the Court and who exercises his/her functions under the authority of the Presidency.[163] The Registrar is elected by the judges, by secret ballot and by absolute majority. Should the need arise and upon the recommendation of the Registrar, the judges also elect the Deputy Registrar in the same manner. Both the Registrar and Deputy Registrar hold office for a period of 5 years and are liable for re-election once.[164]

One of the notable responsibilities of the Registrar is to establish the Victims and Witnesses' Unit (VWU). The purpose of the VWU is, in consultation with the OTP, to provide:

> "[P]rotective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses."[165]

[160] Article 42 (1) of RS.

[161] Article 42 (4) of RS.

[162] *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (Decision on the Request for Disqualification of the Prosecutor) ICC-01/11-01/11-175 (12 June 2012) [30].

[163] Article 43 of RS.

[164] Article 43 (4) and (5) of RS.

[165] Article 43 (6) of RS.

2.3.2 Defence

The Defence is not an organ of the Court, but the term is used in the Legal Texts of the ICC to refer to the accused/convicted person and their legal representatives. According to Article 67 of the Rome Statute, every accused person has the right to be represented by counsel of his own choosing. Accused persons, either on their own, or through their representatives have a right to participate in the proceedings before the Court. [166] For accused persons who cannot afford counsel, one is appointed by the Court with the accused person's involvement and approval.[167] The Defence is a party to the proceedings and the Prosecutor is obliged to disclose to the Defence any exculpatory evidence in his/her possession, or evidence which mitigate the guilt of the accused, or affect the credibility of the Prosecutor's case.[168]

2.3.3 Victims

The Rome Statute envisages the participation of victims of crime in the proceedings before the ICC. In this context "victim" refers to natural persons, organisations, or institutions who have suffered harm as a result of the commission of a crime under the jurisdiction of the ICC.[169] Article 68 permits the expression of the "views and concerns" of victims during the proceedings which is often done through the Legal Representative of Victims (LRV). Victims can also participate in proceedings as witnesses. However, unlike the OTP and Defence, victims are not parties but are participants in the proceedings. This terminology distinguishes between the role played by the OTP and Defence, who automatically take active part in the proceedings, and the role of the victims which is dependent on the permission of the Chamber to be granted, on a case-by-case basis, when the interests of the victims are affected. The interests of victims are also to be considered by the Prosecutor when determining whether to initiate investigations into a certain situation.[170]

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[166] For a comprehensive analysis of the role of the defence at the ICC see Kenneth S Gallant, 'The Role and Powers of Defense Counsel in RS of the International Criminal Court' (2000) 34 The International Lawyer 21.

[167] Article 67 of RS.

[168] Article 67 (7) of RS.

[169] Rule 85 of the RPE.

[170] Article 53 (1) (c) and 54 (1) (b) of RS.

2.4 The *sui generis* nature of the ICC Procedure

2.4.1 The ICC trigger mechanisms

For a situation to come under the jurisdiction of the Court it has to be triggered through referral by a State Party, referral by the UNSC or the OTP's *proprio motu* decision.[171]

Referral by a State Party

A State Party may refer to the Prosecutor a situation in which crimes within the jurisdiction of the ICC appear to have been committed.[172] Four of the situations which have resulted in prosecutions at the ICC (the situations in Uganda, Democratic Republic of Congo (DRC), Central African Republic (CAR) and Mali) were a result of self-referral by States Parties.[173] Self-referral has however been riddled with politics as States parties appear to use it to attain political ends as exemplified by the Ugandan Situation. From 1986, there was a protracted armed conflict between the government forces, Uganda People's Defence Force (UPDF), and members of the Lord Resistance Army (LRA), a rebel group based in Northern Uganda.[174] In 2004, the Ugandan government referred the situation of Northern Uganda to the ICC and only the members of the LRA, not the government forces, have been under investigation and Prosecution by the ICC.[175] Many commentators have seen this as a one-sided case which has politicised the Court.[176]

UNSC referral

Secondly, the UNSC has the power to refer a situation to the ICC under Chapter VI of the United Nations Charter.[177] The UNSC is a political body in the sense that it consists of 5 permanent members (China, Russia, the United Kingdom, the United States, and

[171] Article 13 of RS.

[172] Article 14 of RS.

[173] 'Situations' <https://www.icc-cpi.int/pages/situations.aspx> accessed 5 February 2018.

[174] 'Situation in Uganda' <https://www.icc-cpi.int/uganda> accessed 5 February 2018.

[175] 'Situation in Uganda' (n 174).

[176] See for example discussion in Payam Akhavan, 'The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court.(Developments at the International Criminal Court)' (2005) 99 American Journal of International Law 403.

[177] Article 13 of the RS.

France), essentially victorious powers of WWII, all who have veto powers; and 10 non-permanent members who are elected for two-year terms by the UNGA.[178] The political nature of the UNSC membership has been the subject of debate at the UNGA for many years, with many states objecting *inter alia* to the veto powers of the 5 permanent members, and the lack of regional representation.[179] The politics of the UNSC are imported to the ICC by Articles 13 and 16 of the Rome Statute which empower the UNSC to refer a case to the ICC and to defer cases for a period of 12 months, respectively. It therefore provides an avenue for the Rome Statute, a treaty, to apply to non-party states through the referral of the UNSC, which is a delicate exception to the law of treaties.[180] This is further complicated by the fact that three of the five permanent members (China, the US and Russia) are not States Parties to the Rome Statute. China and the US, for example, have often refused to cooperate with the ICC and/or thwarted efforts by States Parties to cooperate with the Court.[181] The question therefore arises of how these states can justify their exceptionalism: that is how do they subject other non-party states to the jurisdiction of the ICC which they are not subject to?[182]

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[178] 'Permanent and Non-Permanent Members' <http://www.un.org/en/sc/members/> accessed 05 February 2018.

[179] 'Updated Security Council Must Reflect Changing Global Reality, Member States Say, as General Assembly Debates Ways to Advance Progress on Reform | Meetings Coverage and Press Releases' <https://www.un.org/press/en/2016/ga11854.doc.htm> accessed 6 February 2018.

[180] See Article 26 of the Vienna Convention on the Law of Treaties < https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf> accessed 6 February 2018.

[181] The first example is the US entering bilateral agreements with States Parties to the Rome Statute which are in violation of their cooperation obligations under Part IX of the Rome Statute. See the 'American Service-Members' Protection Act' (n 114). A second example is China inviting and hosting former President Bashir when the ICC had issued a warrant of arrest against him and requested states to cooperate by arresting him and surrendering him to the ICC. Admittedly, China as a non-party state is not bound by the Rome Statute but the obligation to apprehend former President Bashir could be drawn from UNSC Resolution 1593 referring the situation in Darfur to the ICC and urging states to cooperate with investigations and prosecutions. See 'China: Do Not Host Sudanese President' (*Human Rights Watch*, 20 June 2011) <https://www.hrw.org/news/2011/06/20/china-do-not-host-sudanese-president> accessed 6 February 2018.

[182] Hemi Mistry and Deborah Ruiz Verduzco, 'The UN Security Council and the International Criminal Court' (London: Chatham House (Retrieved from) < www chathamhouse

So far, the UNSC has referred two situations, Libya and Darfur (Sudan), to the ICC.[183] This gives rise to questions relating to both the criteria and consistency of the UNSC decisions – for example, why refer Libya and not Syria? The process through which the UNSC designates a situation as a threat to international peace and security is a political rather than judicial process which takes into account political preferences and interests of various stake holders.[184] This can be seen, for example, in the failure to refer the situation in Syria to the ICC, resulting from the veto power exercised by China and Russia, which has been seen as a move protecting the political and economic interests of these two states.[185]

Prosecutor's proprio motu powers

The Prosecutor has the power to initiate investigations *proprio motu* based on information received of crimes within the jurisdiction of the Court.[186] The Prosecutor has exercised this power to commence investigations in Burundi, Georgia, Kenya and Côte d'Ivoire.[187] The Ivorian situation is an example of how the exercise of *proprio motu* powers by the prosecution sometimes appears to be politicised. The background is as follows: on 4 May 2011, President Ouattara of Côte d'Ivoire wrote a letter to the ICC Prosecutor stating that Côte d'Ivoire was not able to prosecute the crimes committed during the conflict in Côte d'Ivoire and urging the Prosecutor to conduct investigations.[188] The conflict followed the 2010 elections occurring between the supporters of President Ouattara and Former President Gbagbo, both who claimed to

org/sites/default/files/public/Research/International% 20Law/160312summary pdf 2012) 2 accessed 6 February 2018.

[183] 'Situations' (n 173).

[184] Mistry and Verduzco (n 182) 4.

[185] For an illustration of the political interests of Russia and China in relation to Syria see Amanda Kramer, 'Deconstructing the Security Council's Failure to Refer the Conflict in Syria to the International Criminal Court' <https://queenspoliticalreview.files.wordpress.com/2015/05/qpr-kramer.pdf> accessed 6 February 2018.

[186] Article 15 of RS.

[187] 'Situations' (n 173).

[188] 'Office of the Prosecutor Weekly Briefing 11-16 May 2011' <https://www.icc-cpi.int/NR/rdonlyres/3836B9AF-B0DC-4F94-A4A8-4115E95AE76E/283329/OTPWeeklyBriefing_1116May201187.pdf> accessed 5 February 2018.

have won the election.[189] It ended with the arrest of Former President Gbagbo on 11 April 2011[190] after which President Ouattara sent the above-mentioned letter to the ICC.[191] Subsequently, the Prosecutor sought permission from the PTC and launched investigations in Côte d'Ivoire which resulted in the prosecution of Former President Laurent Gbagbo and Former Youth Minister Charles Blé Goudé.[192] No person allied to President Ouattara during the conflict has been investigated or prosecuted by the ICC. The ICC Prosecutor has continually expressed the intention to continue with investigations touching both sides of the conflict.[193] However, nine years down the line, this has not occurred leading to the ICC being accused of engaging in one sided politics and victor's justice.[194]

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[189] War began in Côte d'Ivoire in 2002, between government forces under the command of Former President Laurent Gbagbo, and rebels later known as the Forces Nouvelles de Côte d'Ivoire (FNCI) allied to President Ouattara. The FNCI ended up occupying around half of the territory of Côte d'Ivoire. It was in this context that elections were held in 2010 resulting in violent clashes between the government-commanded forces and the FNCI. See 'Ivory Coast Profile' *BBC News* (10 January 2018) <http://www.bbc.com/news/world-africa-13287585> accessed 6 February 2018.

[190] 'Ivory Coast's Gbagbo Captured at Presidential Compound' (*VOA*) <https://www.voanews.com/a/fresh-clashes-erupt-in-ivory-coast-after-un-french-attacks-119588724/137817.html> accessed 5 February 2018.

[191] Côte d'Ivoire had accepted the jurisdiction of the Court in April 2003 and only ratified the Rome Statute on 15 February 2013. See 'Côte d'Ivoire' <https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/Cote_d_Ivoire.aspx> accessed 6 February 2018.

[192] *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15 <https://www.icc-cpi.int/cdi/gbagbo-goude> accessed 05 February 2018. It is noteworthy that a case was also instituted against Ms Simone Gbagbo, the former First lady of Cote d'Ivoire and Vice-President of the Ivorian Popular Front (FPI). However, Côte d'Ivoire chose to prosecute her domestically instead of transferring her to the ICC. See *the Prosecutor v. Simone Gbagbo* (Warrant of Arrest for Simone Gbagbo) ICC-02/11-01/12 (29 February 2012).

[193] 'ICC Prosecutor Vows to Investigate Both Sides in Ivory Coast' <https://www.reuters.com/article/us-icc-ivorycoast/icc-prosecutor-vows-to-investigate-both-sides-in-ivory-coast-idUSKCN0YP24B> accessed 6 February 2018.

[194] See for example 'Making Justice Count | Lessons from the ICC's Work in Côte d'Ivoire' (*Human Rights Watch*, 4 August 2015) <https://www.hrw.org/report/2015/08/04/making-justice-count/lessons-iccs-work-cote-divoire> accessed 6 February 2018; Luis Santos Soberon, 'Victor's Justice : Assessing the Impact of One-Sided International Prosecutions on Grave Crimes in Côte d'Ivoire' (Thesis, 2016) <https://repositories.lib.utexas.edu/handle/2152/45782> accessed 6 February 2018; Yao Nikez Adu,

2.4.2 Procedural law at the ICC

Investigation

The drafters of the Rome Statute faced the difficulty of balancing the common law concept of prosecutorial discretion and independence and the civil law concept of judicial involvement in investigations.[195] On the one hand, delegates with common law backgrounds insisted that the investigation process should be free from judicial intervention, except at the level of issuance of warrants, to preserve the independence of the Prosecutor.[196] On the other hand, their civil law counterparts argued for the involvement of the judges at the investigation level to prevent possible abuse of prosecutorial powers, to provide judicial supervision and to protect the rights of the persons under investigation.[197]

Eventually, because of the complex crimes involved, both sides agreed that there was need for both prosecutorial discretion as well as judicial review and supervision to ensure due process.[198] The result of the negotiation was an innovative introduction of the Pre-Trial Chamber (PTC) which is a "hybrid institution based on civil law proposals that would ensure the efficiency and the integrity of the proceedings and protect the rights of the Defence."[199]

In the final text of the Rome Statute, after a situation has been triggered, the Prosecutor's decision to commence investigations is governed by three factors: whether there is reason to believe that a crime has been committed which falls under the jurisdiction of the ICC; the admissibility of the situation under Article 17 of the Rome

'International Criminal Law and Victor's Justice: The Case of Côte d'Ivoire' (2016) 20 American Scientific Research Journal for Engineering, Technology, and Sciences (ASRJETS) 129.

[195] Fabricio Guariglia, 'Investigation and Prosecution' in, Roy Lee (ed) *The International Criminal Court: The Making of the Rome Statute--Issues, Negotiations, and Results* (1 edition, Springer 1999) 228–230.

[196] Schabas (n 119) 249.

[197] Guariglia (n 195) 228.

[198] Guariglia (n 195) 228.

[199] Silvia Fernandez de Gurmendi, 'The Negotiating Process' in Roy Lee (ed), *The International Criminal Court: The Making of the Rome Statute--Issues, Negotiations, and Results* (1 edition, Springer 1999) 223.

Statute; as well as the gravity of the crime and the interests of victims.[200] The PTC may review the decision of the Prosecutor not to proceed with investigation and may request the Prosecutor to reconsider. The Prosecutor can reconsider a decision not to proceed with investigation upon the availability of new facts or information.[201]

Should the Prosecutor determine that there is reason to conduct investigations, s/he submits a request to the PTC seeking authorization to conduct investigation and includes the supporting material collected.[202] The PTC then determines whether there is a reasonable basis to proceed with investigation and whether the crimes fall within the jurisdiction of the Court, upon which the PTC may authorize the commencement of investigations. If the PTC denies the request, the OTP may reapply if new facts or information emerge.[203] The UNSC has powers to pause an investigation for a renewable period of 12 months through a resolution passed under Chapter IV of the UN Charter.[204]

While conducting investigations, the Prosecutor shall consider both exonerating and incriminating factors equally to establish the truth.[205] This is unlike the role of the prosecutor in civil law and even in many common law systems. On one hand, in civil law systems, the judge conducts investigations and prepares a dossier which is available to both the prosecutor and defence counsel. On the other hand, in common law systems, the prosecutor does not investigate, but considers the evidence received from the police or investigating agencies. Prosecutors in many common law systems also have a duty to consider exculpatory evidence together with incriminating evidence when exercising the prosecutorial discretion.[206]

During the investigation process, the ICC Prosecutor may collect and examine evidence, request the presence of and question the persons being investigated, as

[200] Article 53 of RS.

[201] Article 53 (4) of RS.

[202] Article 15 (3) of RS.

[203] Article 15 of RS.

[204] Article 16 of RS.

[205] Article 54 of RS. See also Fatou Bensouda, 'The ICC Statute - An Insider's Perspective on a Sui Generis System for Global Justice' (2010) 36 North Carolina Journal of International Law and Commercial Regulation 277, 280.

[206] Carter and Pocar (n 85) 16–24; Schabas (n 119) 250.

well as victims and witnesses. The Prosecutor may also seek the cooperation of a state or inter-governmental organisation and enter into agreements or arrangements with such state, inter-governmental organisation or person to secure cooperation. When making such arrangements or entering such agreements the Prosecutor may undertake not to reveal information received based on confidentiality and take necessary measures to keep such confidentiality. However, confidentiality applies solely for the purpose of generating new evidence.[207]

At this stage the PTC has the power, upon request by the Prosecutor, to issue orders and warrants to aid the investigation process as well as to provide for: "the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or have appeared in response to a summons, and the protection of national security information." [208] The PTC also has the power to seek cooperation of a state for the purpose of forfeiture of the assets of a suspect for the ultimate benefit of victims.

The PTC, after reviewing the available evidence, may issue a warrant of arrest if the judges are satisfied that such arrest is necessary: to ensure the person attends trial and does not hinder the investigations or the proceedings, as well as to prevent the person from continuing to commit crimes which arise from similar circumstances and which are under the jurisdiction of the Court.[209] The Prosecutor may request the PTC to amend the warrant of arrest and the PTC may do so if it is satisfied that there are reasonable grounds to believe that the person committed the modified or added crimes. As an alternative to an arrest warrant the Prosecutor may request the PTC to issue summons to appear if such summons would be sufficient to ensure the person's presence at trial.[210]

Based on the warrant, the Court, through the Registry, may request a State Party to provisionally arrest or to arrest and surrender the person to the ICC.[211] Upon receipt of such request, the State Party should take immediate steps to arrest the person in

[207] Article 54 (3) of RS.

[208] Article 57 of RS.

[209] Article 58 of RS.

[210] Article 58 of RS.

[211] Article 58 (5) of RS.

question in accordance with its laws and the cooperation procedure of the ICC.[212] The arrested person is then brought before the judicial organ of the custodial state which determines that the warrant applies to the person and that the person's rights are respected. However, the Rome Statute prohibits such domestic judicial organ from determining whether the warrant was properly issued by the ICC.[213] The custodial state is to surrender the person to the ICC as soon as it is so ordered.[214]

Pre-trial

Upon the person's arrival at the ICC, s/he is to be informed of the charges against them and their rights. The PTC may review the arrest warrant and decide to release the person with or without conditions.[215] The PTC then conducts proceedings to confirm the charges against the person, which are held in the presence of the person charged and his/her counsel as well as the Prosecutor.[216] However, under exceptional circumstances, these proceedings may be held in the absence of the person charged if such person has waived his/her rights or has fled and reasonable steps have been taken to locate him/her. Such person must however be represented by counsel. Before the hearing the Prosecutor may continue with investigations and amend or withdraw charges. At the hearing, the Prosecutor presents sufficient evidence to "establish

[212] The cooperation procedure is provided for in Part IX of the RS. The ICC has made several requests to States parties (including Chad, Malawi, Kenya, South Africa, Nigeria, and the Hashemite Kingdom of Jordan) to arrest and surrender former President Bashir to the Court, however none of these states has complied. The ICC has issued several decisions stating that these States Parties had the obligation to cooperate with the ICC by arresting former President Bashir which they had failed to perform. See for example: *The Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir) ICC-02/05-01/09 (6 July 2017). The ICC further referred the non-cooperation of some of these States, (for example Chad, Malawi, Kenya, and Jordan) to the UNSC and the ASP as stipulated by the Rome Statute. See for example: *The Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir) ICC-02/05-01/09 (11 December 2017).

[213] Article 59 (4) of RS.

[214] Article 59 (7) of RS.

[215] Article 60 of RS.

[216] Article 61 of RS.

substantial grounds to believe that the person committed the crime charged".[217] The person charged may object to the charges, challenge the evidence, and present evidence.

Based on the confirmation hearing, the PTC may "determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged."[218] Subsequently, the PTC may confirm the charges, decline confirmation or order the Prosecutor to conduct further investigations or to amend a charge. If the charges are confirmed the PTC then commits the person charged to a Trial Chamber (TC) for trial on the basis of the charges confirmed.[219] After the charges are confirmed and before the trial begins, the Prosecutor may, with authorisation of the PTC and notice to the accused, amend charges. However, if the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing is held to confirm the additional or amended charges. After confirmation, the Prosecutor may withdraw the charges, with the authorisation of the PTC.[220] If the charges are not withdrawn, the Presidency then constitutes a TC to try the accused person.

Trial

Trials are to be held at the seat of the Court, in The Hague, The Netherlands, unless a contrary decision is made.[221] So far, all the trials at the ICC have been held at The Hague. The defence team of former President Gbagbo requested that the opening of the trial be held in Abidjan, Cote d'Ivoire or alternatively in Arusha, Tanzania, but the Chamber rejected this request citing security and logistical reasons.[222]

The accused has a right to be present at trial except when their presence continuously disrupts trial, in which case the TC may order them removed and they shall be represented by counsel. Such measures are to be employed under very exceptional

[217] Article 61 (5) of RS.

[218] Article 61 (7) of RS.

[219] Article 61 (7) (a) of RS.

[220] Article 61 (9) of RS.

[221] Article 62 of RS.

[222] Deji Badmus, 'ICC Declines Gbagbo's Request to Have Trial Held in Abidjan' (*CGTN Africa*) <https://africa.cgtn.com/2015/10/27/icc-declines-gbagbos-request-to-have-trial-held-in-abidjan/> accessed 31 October 2019.

circumstances and only during the duration necessary, after all attempts have been made to find alternative measures.[223] The TCs have so far not had to resort to excluding an accused person from trial due to disruptive behaviour.

The right to be present at trial was extensively debated in the cases of President Uhuru Kenyatta and Deputy President William Ruto of Kenya. Upon request, first by Ruto and then Kenyatta, the TC in both cases held that they were excused from continuous presence at trial, except on exceptional mentioned instances, to allow them to perform state duties.[224] However, the Ruto decision, which the Kenyatta one had been based on, was overturned by the Appeals Chamber which held that the general rule was that the accused had to be present at trial and excusal was a remedy to be resorted to under limited circumstances.[225] Subsequently, the TC reconsidered its decision on Kenyatta's excusal in light of the Appeals Chamber's decision.[226] This resulted in a diplomatic storm which culminated in the ASP's adoption of Rules 134 *bis*, 134 *ter*, and 134 *quater*, which amended the RPE allowing accused persons not to be continuously present at trial.[227] This is another example, in addition to the discussion in part 2.2.2 of politics influencing critical legal issues at the ICC.

The TC has the responsibility to ensure that the trial is conducted in a fair and expeditious manner while balancing the rights of the accused and the protection of the victims and witnesses.[228] After conferring with parties, the TC may order the joinder or

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[223] Article 63 of RS.

[224] *The Prosecutor v William Ruto and Joshua Arap Sang* (Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial) ICC-01/09/01/11 (18 June 2013) and; *The Prosecutor v Uhuru Muigai Kenyatta* (Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial) ICC-01/09-02/11 (18 October 2013).

[225] *The Prosecutor v William Ruto and Joshua Arap Sang* (Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber V(a) of 18 June 2013 entitled "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial) ICC-01/09/01/11 OA 5 (25 October 2013).

[226] *The Prosecutor v Uhuru Muigai Kenyatta* (Decision on the Prosecution's Motion for Reconsideration of the Decision Excusing Mr Kenyatta from Continuous Presence at Trial) ICC-01/09-02/11 (26 November 2013).

[227] See discussion in Steven A Koh, 'Presence and Politics at the International Criminal Court' (*American Society on International Law*, 1 June 2015) <https://www.asil.org/insights/volume/19/issue/11/presence-and-politics-international-criminal-court> accessed 17 November 2017.

[228] Article 64 (2) of RS.

severance of charges in cases involving multiple accused persons.[229] The TC has employed this power to sever the charges against Germain Katanga and Mathieu Ngudjolo[230] and to join the charges against former president Laurent Gbagbo and Charles Blé Goudé.[231]

During trial the TC also has power to: order the presentation of evidence or the attendance of witnesses by seeking the assistance of states; protect confidential information; protect witnesses, the accused person and victims; and to order the production of further evidence apart from that provided at trial by the parties; as well as to rule on admissibility of evidence and to take measures to maintain order during the hearing.[232] As a rule, the trials are held in public. However, under exceptional circumstances the TC may order a closed session to protect witnesses, victims or the accused; or to protect sensitive and confidential information.[233]

Admission of guilt

At the commencement of trial, the charges are read to the accused in a language s/he understands, and the accused is afforded the opportunity to plead guilty or not guilty.[234] Dealing with a guilty plea "was the 'test case' for the Preparatory Committee's ability and willingness to arrive at solutions which accommodated concepts from both common law and civil law legal systems."[235] This is evident first on the level of terminology – common law jurisdictions tend to use the term "guilty plea" while civil law

[229] Article 64 (5) of RS.

[230] *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons) ICC-01/04-01/07 (21 November 2012).

[231] *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé* (Decision on Prosecution requests to join the cases of The Prosecutor v Laurent Gbagbo and The Prosecutor v Charles Blé Goudé and related matters) ICC-02/11-01/15 (11 March 2015).

[232] Article 64 of RS.

[233] Article 64 (7) of RS.

[234] Article 64 (8) (a) of RS.

[235] Hans-Jörg Behrens, 'The Trial Proceedings' in Roy Lee (ed), *The International Criminal Court: The Making of the Rome Statute-Issues, Negotiations, and Results* (1 edition, Springer 1999) 241.

jurisdictions generally use "confessions" or "admission of guilt".[236] The drafters therefore attempted to find terms that were not leaning towards either legal system.[237] On a procedural level, the drafters also had to balance between the effects of admission of guilt in the two legal systems. Behrens explains that the problems encountered by the ICTY, which had followed a common law approach, in the *Erdemović* case [238] prompted the drafters of the Rome Statute to desire alternative solutions by blending the two systems.[239]

Article 65 of the Rome Statute therefore provides that if an accused admits guilt, the TC will determine whether: the accused understands the nature and the consequences of the admission of guilt; the admission is made voluntarily after consultation with the defence counsel; and that the admission is consistent with the facts of the case as per the charges presented by the Prosecutor, any other material brought by the Prosecutor as well as evidence presented by witnesses.[240] Once the TC is satisfied of the above it may consider the admission of guilt as "establishing all the essential facts that are required to prove the crime to which the admission of guilt relates" and proceed to convict the accused.[241] If the TC is not convinced of the above, it will consider the admission of guilt as invalid and proceed to order a trial and may remit the case to another TC.[242] In this regard, the Rome Statute provides that: "any discussions between the Prosecutor and the Defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court."[243]

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[236] Behrens (n 235) 241; see also Caslav Pejovic, 'Civil Law and Common Law: Two Different Paths Leading to the Same Goal' (2001) 32 Victoria University of Wellington Law Review 817.

[237] Behrens (n 235) 241.

[238] See *The Prosecutor v Drazen Erdemović* (Appeal Judgment) IT-96-22-A (7 October 1997). In this case the accused entered a guilty plea and was convicted and sentenced to 10 years imprisonment. He appealed against the conviction and sentencing, this appeal was dismissed but the Appeal's Chamber remitted the case to a different TC and ordered that the accused re-plead on the basis that his initial guilty plea had not been properly informed. See further discussion of this case in part 5.3.1 of this dissertation.

[239] Behrens (n 235) 241.

[240] Article 65 (1) of RS.

[241] Article 65 (2) of RS.

[242] Article 65 (3) of RS.

[243] Article 65 (5) of RS.

Article 65 of the Rome Statute was applicable in the *Al Mahdi* case.[244] In this case, the accused pleaded guilty to the war crime of destruction of cultural and historical monuments in Timbuktu, Mali. Furthermore, the Prosecutor and the Defence entered into a plea agreement in which Mr Al Mahdi took responsibility for the crimes charged and provided a detailed account of his actions. In the judgment, the TC held that the guilty plea and the fact that it was entered in a timely manner was a mitigating factor. The TC held *inter alia* that:

> "The Chamber considers that an *admission of guilt is undoubtedly a mitigating circumstance and gives it substantial weight*. In this regard, the Chamber notes that the admission was made early, fully and appears to be genuine, led by the real desire to take responsibility for the acts he committed and showing honest repentance. This admission of guilt undoubtedly contributed to the rapid resolution of this case, thus saving the Court's time and resources and relieving witnesses and victims of what can be a stressful burden of giving evidence in Court. Moreover, this admission may also further peace and reconciliation in Northern Mali by alleviating the victims' moral suffering through acknowledgement of the significance of the destruction. Lastly, such an admission may have a deterrent effect on others tempted to commit similar acts in Mali and elsewhere" (emphasis added).[245]

Mr Al Mahdi was sentenced to 8 years' imprisonment, including the time he had spent in pre-trial detention. The *Al Mahdi* case is proof that admission of guilt and agreements between the Defence and the Prosecutor fit in the legal framework of the ICC and may be used to not only terminate cases expeditiously, but also serve other aims of the ICC such as fostering peace and setting a historical record.

When an accused person pleads guilty, s/he forfeits fundamental trial rights provided for in the Rome Statute. The Rome Statute provides for the presumption of innocence and the onus is on the Prosecutor to prove the guilt of the accused beyond reasonable doubt.[246] During trial the accused person has rights similar to those provided for in the

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[244] *The Prosecutor v. Ahmad Al Faqi Al Mahdi* (Sentence and Judgment) ICC-01/12-01/15 (27 December 2016).

[245] *Al Mahdi* (Sentence and Judgment) (n 244) para 100.

[246] Article 66 of RS.

International Covenant on Civil and Political Rights (ICCPR).[247] The accused is entitled to a public, fair and impartial hearing with certain minimum guarantees: to be informed of the charges against him/her in a language s/he understands; to have adequate time and facilities to prepare for the trial; to be present at trial and to conduct defence in person or through counsel of one's choosing; and indigent accused persons have a right to have legal counsel appointed for them at the Court's expense. Accused persons also have a right to examine witnesses against them and the right to call witnesses; as well as the right to interpretation of proceedings and translation of key documents into a language the accused fully understands. Furthermore, there is the right to remain silent, the right "not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal", as well as the right to have the Prosecutor disclose to him/her evidence that proves his/her innocence or undermines the Prosecutor's case.[248] The rights forfeited by the accused person upon pleading guilty is discussed in detail in subsequent chapters.

When the personal interests of victims are affected, the TC is to allow them to present their views and concerns, balancing these with the right of the accused to a fair and impartial trial. These views are often presented by the Legal Representative of Victims (LRV) after the authorisation of the Chamber on a case-by-case basis. The TC is also to ensure the protection of the security, privacy and dignity of victims and witnesses, following the advice of the Victims and Witnesses Unit (VWU) by putting in place measures such as closed *in camera* proceedings, or video link as appropriate.[249]

Sentencing

Upon conviction, the TC orders a further hearing to determine the sentencing, except where there is a valid admission of guilt as discussed above. During the sentence hearing the TC takes into account evidence relevant to the sentencing presented at trial and may admit other relevant evidence. The sentence is pronounced in public in the presence of the accused.[250] The TC can either sentence a convicted person to imprisonment for a period of not more than 30 years, or to life imprisonment depending

[247] Article 67 of RS. See discussion in Carter and Pocar (n 85) 18.

[248] Article 67 of RS.

[249] Article 68 of RS.

[250] Article 76 of RS.

on the gravity of the crime and the personal circumstances of the person.[251] In addition, the TC may impose a fine or forfeiture of assets and proceeds derived from the crime for which the person is convicted. In imposing the sentence, the Court deducts the time spent by the accused in pre-trial and trial detention.[252] For example, Mr Germain Katanga was sentenced to 12 years imprisonment but after deduction of time spent in pre-trial and trial detention, he was released about a year after his conviction.[253]

Appeals

The procedure on appeals was also an issue which required a blend of civil law and common law during the drafting of the Rome Statute. Generally, in civil law systems, an appeal can be a trial *de novo,* meaning the appeal may be conducted by way of fresh proceedings in spite of the record from the lower courts; while in common law systems an appeal is normally based on the record of the trial and is limited to errors of facts or law; some countries allow admission of new evidence under limited circumstances.[254] The other issue is that in most civil law countries, both the defence and prosecution can appeal against both convictions and acquittals which means that there can be a conviction after an acquittal and vice versa. On the other hand, in many common law countries only the accused may appeal against a conviction, and an acquittal cannot be reversed on appeal.[255]

The Rome Statute attempts to find a middle ground and provides that in case of a conviction or acquittal the Prosecutor and Defence may appeal based on procedural error, error of law and error of fact. [256] The Defence may also appeal based on any other grounds that affect the fairness and reliability of the decision. Both parties may also appeal against the sentence on grounds that is it not proportionate to the gravity

[251] Articles 77 and 78 of RS.

[252] Article 78 (2) of RS.

[253] 'Congolese Warlord Katanga First ICC Convict Released' <https://af.reuters.com/article/worldNews/idAFKCN0T21RR20151113> accessed 17 November 2017.

[254] Carter and Pocar (n 85) 31.

[255] Carter and Pocar (n 85) 30.

[256] Article 81 of RS. See the interpretation of this standard of review in the Appeals Chamber decision in the Bemba case: *The Prosecutor v. Jean Pierre Bemba Gombo* (Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute") ICC-01/05-01/08-3636-Red (8 June 2018) [35–69].

of the crime. As a rule, after a conviction, the convicted person remains in custody during the appeal while after an acquittal the person is to be released immediately. However, under exceptional circumstances, at the request of the Prosecutor, the TC may order that the person remain detained after an acquittal, pending the appeal, considering the gravity of the crime, the likelihood of success in appeal and flight risk of the person.[257]

On appeal, the Appeals Chamber may reverse or amend the decision or sentence or order a new trial before a different TC. The Appeals Chamber may remit a factual issue to the original TC for consideration. Alternatively, the Appeals Chamber may order the presentation of new evidence before it, in which case it will have the powers of the TC. If the appeal against the decision or sentencing is made by the accused person, the decision may not be to the detriment of that person. The appeal might be rendered in the absence of the convicted or acquitted person.[258]

Enforcement of sentence

The sentence is served in a state designated by the Court from a list of States which have expressed their willingness to accept sentenced persons through signing of an Agreement on the Enforcement of Sentences with the International Criminal Court. The placement is done taking into consideration *inter alia*: the principle that states shall share responsibility in enforcement of sentencing, the views of the accused, and nationality of the accused. If there is no state willing to accept the sentenced person, the sentence is to be served in the host state, the Netherlands, in line with the Host State Agreement.[259]

Victim Reparations

Reparation proceedings begin upon conviction. If the convicted person appeals against the conviction, the reparation and appeal proceedings run concurrently. [260] During

[257] Article 81 (3) of RS.

[258] Article 83 of RS.

[259] Article 103 of RS.

[260] See for example *The Prosecutor v Jean-Pierre Bemba Gombo* (Decision on the Defence request for an extension of time to file additional observations for reparations) ICC-01/05-01/08 (08 November 2017).

reparation proceedings, the Court determines "the scope and extent of any damage, loss and injury to, or in respect of, victims" after which the Court may make a direct order against the convicted person, or order that the award be made through the Trust Fund for Victims.[261] Before making an order for reparations, the Court takes submissions from the convicted person, the victims and other interested parties like states. The reparations may be individual or collective but have so far been collective and symbolic.[262]

2.5 Conclusion

This chapter began by discussing how international consensus on the need for prosecution of international crimes culminated in the establishment of the ICC. Although a significant segment of the international community agreed that there needed to be a permanent international criminal court, the nature of the court, its jurisdiction, its organs, its relationship with the UNSC and its procedure were highly contentious and heavily politicised. States Parties therefore made both political and legal compromises to establish the ICC which attempts to accommodate the wishes of all States Parties. On a procedural level, the result of this compromise was the creation of a new model, based on principles from civil law and common law systems as well as best practices from preceding *ad hoc* international criminal tribunals. The result is the establishment of a new procedural law at the ICC on all levels from investigation to appeals with the additional features of active victim participation and reparation.

Regarding admission of guilt, the Rome Statute combines civil law and common law best practices as well as lessons from the ICTY, for example the *Erdemović* case mentioned above. Article 65 of the Rome Statute was utilised in the *Al Mahdi* case where a plea agreement entered between the Defence and the Prosecutor was accepted by the Chamber and a conviction was entered on that basis. The Chamber considered the guilty plea to be a mitigating factor because it had helped to expeditiously resolve the case thereby saving the Court's time and resources. This shows that plea agreements fit into the ideological, structural and procedural

[261] Article 75 of RS.

[262] See for example, *The Prosecutor v Thomas Lubanga Dyilo* (Information regarding Collective Reparations) ICC-01/04-01/06 (13 February 2017) where of the Court ordered collective symbolic reparations .

framework of the ICC and a plea negotiation regime may be a beneficial addition to the Court's framework.

The next chapter will deal with the problems facing the ICC; problems which inform the question of whether plea negotiation may be a potential procedural solution. The *sui generis* nature of the ICC procedure discussed in this chapter makes the proceedings very complex, lengthy, and expensive. Also, as has been shown, politics influence critical issues at the ICC and this is a challenge since the ICC depends on the cooperation of States Parties for the collection of evidence, the arrest and surrender of suspects to the ICC as well as enforcement of sentences.

CHAPTER 3: CHALLENGES FACING THE INTERNATIONAL CRIMINAL COURT

3.1 Introduction

Chapter two discussed procedural law at the ICC which is a *sui generis* international criminal procedure with unique characteristics; differing significantly from the criminal procedure in national jurisdictions and that of preceding international criminal tribunals. This chapter discusses the challenges facing the ICC, many of which arise from the unique nature of the procedural law. The challenges faced at the ICC may be classified into at least three categories: legal and procedural challenges, challenges of a political nature, and difficulties in implementing the victim participation and reparation regime.

These challenges will be discussed in this chapter as follows: part 2 deals with the legal and procedural challenges such as the complexity of ICC proceedings, lengthy trials and the technical disclosure regime. Part 3, discusses political challenges such as the Africa-ICC problem, state cooperation with the ICC, and political instrumentalization of the Court. Part 4 of this chapter discusses the challenges faced in the implementation of the new victim participation and reparation regime. The objective of this chapter is to assist in answering the main question of the dissertation, that is whether plea negotiation may be a potential solution to the challenges facing the ICC.

3.2 Legal and procedural challenges

3.2.1 Complexity of proceedings

Most of the literature in existence concerning complexity of proceedings relates to civil trials in the USA[263] and are not necessarily applicable to international criminal trials. However, there are three forms of complexity emerging from literature which are also applicable to the ICC and these are: legal complexity, factual complexity and

[263] See for example Jay Tidmarsh, 'Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power' (1992) 60 The George Washington Law Review 1683 and Jeffrey W Stempel, 'A More Complete Look at Complexity' (1998) 40 Arizona Law Review 781.

participant complexity.[264] First, legal complexity arises from the law which the court has to rely on to reach a decision.[265] The law is considered complex if: for example, it is dense (marked by the presence of many overlapping rules);[266] difficult to ascertain (has numerous sources therefore it is difficult to ascertain which laws to apply); and is very technical (requires special expertise).[267] Secondly, factual complexity arises where the information required to arrive at a decision is voluminous, technical, layered or difficult to determine.[268] Finally, participant complexity refers to the complication introduced by the participants in the proceedings such as judges, the Prosecutor, defence lawyers, the accused person, witnesses, and victims among others.[269] Considering the above definition of complexity, the ICC system is complex on all three levels, legal, factual, and participant complexity, as illustrated below.

Legal complexity

First, the ICC is legally complex since the applicable law is dense and consists of a plethora of norms found in numerous sources. In the first place, the Court applies the Rome Statute, the Elements of Crimes and the RPE.[270] These mandatory sources are supplemented by other guidelines found in the Regulations of the Court, Regulations of the Registry, Regulations of the Office of the Prosecutor, as well as other ancillary instruments such as treaties drafted by the ASP.[271] In the second place, the Court applies applicable treaties as well as rules and principles of international law including the principles of international law of armed conflict.[272] In the third place, the Court may also apply general principles of law from national jurisdictions including the laws of the state that would normally have jurisdiction over the crimes in question.[273] Furthermore,

[264] Stuart Ford, 'Complexity and Efficiency at International Criminal Courts' (2014) 29 Emory International Law Review 2. (He discusses the application of these three types of complexity to the ICTY).

[265] Ford (n 264) 13.

[266] Ford (n 264) 13.

[267] Ford (n 264) 13.

[268] Ford (n 264) 13.

[269] Ford (n 264) 13.

[270] Article 21 (1) (a) of RS.

[271] See discussion of these instruments in part 1.3 of this dissertation.

[272] Article 21 (1) (b) of RS.

[273] Article 21 (1) (c) of RS.

the Court may also apply principles and rules of law as interpreted in its previous decisions.[274]

Apart from the fact that the applicable law at the ICC is contained in numerous sources, it is also very technical. This is because it is a *sui generis* body of law; consisting of a blend of civil and common law norms, as well as norms formulated from best practices at the *ad hoc* tribunals, and innovative provisions resulting from the negotiation between states.[275] Another layer of complexity is added by the somewhat uncertain nature of the law at the ICC created by the fact that the drafters of the Rome Statute left many aspects of the procedural law for the ICC judges to clarify.[276] For example, Kress argues that the drafters used the diplomatic concept of *constructive ambiguity* on "strategically important points". This means that "the shaping of the overall architecture of the ICC proceedings has been left to the judges."[277] Since its establishment the judges have refined the procedure at the ICC and established guidelines to make the procedure more streamlined.[278] However, there are still many aspects of the law that needs clarification for example the victim participation and reparation regime, discussed below.[279]

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[274] Article 21 (2) of RS.

[275] See discussion in part 2.2.4 of this dissertation.

[276] See discussion in part 2.2.4 of this dissertation.

[277] Claus Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise Symposium: On Some of the Legal Problems the ICC Is Currently Facing' (2003) 1 Journal of International Criminal Justice 603, 605–606.

[278] See for example the 'Chambers Practice Manual, February 2016' (n 22). It is a document that was first formulated by PTC judges reflecting on the best practices during the pre-trial stage of proceedings at the ICC. It was later updated to include other stages of the proceedings with the aim of improving the overall effectiveness and efficiency of the Court. See also 'Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel Working with Intermediaries' <https://www.icc-cpi.int/iccdocs/lt/GRCI-Eng.pdf> accessed 16 February 2018. This was passed after the many challenges experienced by the Chamber with regard to the participation of intermediaries in the proceedings since the use of intermediaries was neither provided for the Rome Statute nor in the RPE.

[279] See discussion in part 3.4 below.

Legal and factual complexity

Charges, which are the basis of ICC cases, are governed by rules which are both legally and factually complex. A charge, in the ICC context, comprises of facts and legal characterization of those facts.[280] Before the pre-trial hearing, the Prosecutor is obligated to provide the person charged with the document containing the charges (DCC) upon which the prosecution intends to rely.[281] The DCC contains (i) the name of the person and other identifying information, (ii) a statement of the facts which provide a legal and factual basis to bring the person to trial, and (iii) the legal characterisation of the facts according to the definition of the crimes and the modes of liability in the Rome Statute.[282] Before confirmation of charges, the Prosecutor may amend the charges with authorisation of the PTC after having informed the person charged.[283] Technically, after the charges are confirmed and the case is transferred to a TC, the TC cannot amend the charges.

However, according to Regulation 55 of the Regulations of the Court, the TC may amend the legal characterisation of the facts "without exceeding the facts and circumstances described in the charges and any amendments to the charges."[284] If, at any time during the trial, it appears to the TC that it might be necessary to change the characterisation of the facts, the TC is required to give notice to the participants.[285] The TC is also required, after hearing the evidence and at an appropriate stage, to allow the participants to make submissions on the proposed re-characterization of the facts. If necessary, the TC may suspend the proceedings to allow the participants adequate time and facilities to prepare and may also order a hearing to consider all arguments related to the proposed change.[286]

Regulation 55 is a novel provision in international criminal law, which did not exist in the Statutes of the *ad hoc* tribunals, therefore its interpretation is a source of continuous

[280] Regulation 52 of the Regulations of the Court (RoC).

[281] Article 61 of RS.

[282] Regulation 52 of the ROC.

[283] Article 61 (9) of RS.

[284] Regulation 55 of the RoC.

[285] Regulation 55 (2) of the RoC

[286] Regulation 55 (2-3) of the RoC.

controversy leading to lengthy litigation at the ICC.[287] For example, in the *Lubanga case* TC I, by majority, gave notice of the likelihood to re-characterize the facts of the case.[288] In the decision giving notice, the Majority in TC I, held that regulation 55 provides for two distinct procedures for the change of the legal characterization of facts which apply at two different stages of the proceedings: during the final judgment under Article 74 of the Rome Statute and at any time during the trial. In this regard, the Majority argued that when re-characterization was done during the issuance of an Article 74 judgment, the Chamber was obliged not to exceed the facts and circumstances of the charges. However, they continued, if re-characterization occurred during the trial, the Chamber could exceed the facts and circumstances of the charges; so long as the rights of the accused person were respected.[289]

Both the defence and prosecution sought leave to appeal against the decision; TC I granted leave and adjourned the submission of evidence pending the determination of the matter on appeal.[290] The Appeals Chamber rejected the interpretation of TC I and held that, while the TC had the authority to change the legal characterization of the facts, Regulation 55 did not allow for the change to exceed the facts and circumstances described in the charges.[291] In other words, while the TC interpreted Regulation 55 to contain two distinct procedures, with different requirements, the Appeals Chamber determined that it contained a single unified procedure.

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[287] Joyce Aluoch, 'Ten Years of Trial Proceedings at the International Criminal Court' (2013) 12 Washington University Global Studies Law Review 433, 440.

[288] *Prosecutor v. Thomas Lubanga Dyilo* (Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court) ICC-01/04-01/06-2049 (14 July 2009) [35].

[289] *Lubanga* (Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court) (n 288) paras 27–29.

[290] *Prosecutor v. Thomas Lubanga Dyilo* (Decision adjourning the evidence in the case and consideration of Regulation 55) ICC-01/04-01/06-2143 (2 October 2009) [22].

[291] *The Prosecutor v. Thomas Lubanga Dyilo* (Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court') 8 December 2009 [88].

Secondly, on one hand, TC I held that if the change occurred during the trial, a TC had the power to change the legal characterisation of the facts in a manner that exceeded the facts and circumstances of the confirmed charges. On the other hand, the Appeals Chamber held that under no circumstances could a TC change the legal characterisation of the facts to exceed the facts and circumstances of the charges. The fact that the Appeals Chamber's decision was significantly different from that of the Majority in TC 1 shows how complex and controversial this issue is.

A further example of the complexity of Regulation 55 is demonstrated by its application in the case of *Katanga and Ngudjolo*.[292] In this case TC II by majority, judge Van den Wyngaert dissenting, issued a notice to the participants of its intention to change the legal characterization of the charges with regard to the modes of liability of Mr Katanga. The notice was issued at the deliberation stage of the case when all the evidence had been heard and the presentation of evidence was closed. Both Mr Katanga and Mr Ngudjolo had given evidence in support of their respective cases. While deliberating on the evidence given by Mr Katanga, the Majority in TC II decided that the mode of participation of Mr Katanga could be classified differently, to include Article 25 (3) (d) (ii), in addition to Article 25 (3) (a),[293] the latter which had been confirmed by the PTC.[294]

Since this re-characterization did not affect Mr Ngudjolo, TC II by the same decision severed the cases against the two accused persons and scheduled a date for the

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[292] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons) ICC-01/04-01/07-3319-tENG/FRA (21 November 2012).

[293] Article 25 of RS provides for the modes of liability for crimes under the jurisdiction of the Court. Article 25 (3) (a) provides that a person shall be liable if the s/he: "[c]ommits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible". While articles 25 (3) (d) provides that a person shall be liable if s/he: "In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime."

[294] *Katanga and Ngudjolo* (Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons) (n 292) para 9.

issuance of the Article 74 judgment against Mr Ngudjolo.[295] The Majority acknowledged that changing the legal characterization of the charges at the deliberation stage might call into question the impartiality of the judges; since it appeared like they were already convinced of Mr Katanga's guilt and were therefore seeking to convict him at all costs.[296] They also admitted that the deliberation regarding Mr Katanga's liability under Article 25 (3) (a) was "already well under way"; but stressed that the decision to re-characterize his liability to include Article 25 (3) (d) (ii) was reached after a careful consideration of the evidence.[297]

Judge Van den Wyngaert dissented to the Majority decision and held *inter alia* that the change proposed by the Majority exceeded the facts and circumstances of the charges thereby contravening regulation 55.[298] She further held that the change violated the fair trial rights of Mr Katanga since the mode of liability under Article 25 (3) (d) (ii), which the Majority sought to introduce, is very different from the one under Article 25 (3) (a) which had been confirmed by the PTC.[299] Furthermore, she held that the decision further infringed the right of the accused person because of the appearance of partiality and bias arising from the fact that the notice was given at such a late stage after TC II had examined the evidence.[300] This, she argued, gave the impression that the Majority would have acquitted Mr Katanga with regard to liability under Article 25 (3) (a), and therefore decided to change the mode liability to Article 25 (3) (d) (ii) to enable a conviction.[301]

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[295] *Katanga and Ngudjolo* (Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons) (n 292) para 63.

[296] *Katanga and Ngudjolo* (Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons) (n 292) para 19.

[297] *Katanga and Ngudjolo* (Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons) (n 292) para 19.

[298] *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons) (dissenting opinion of Judge Van den Wyngaert) ICC-01/04-01/07-3319-tENG/FRA (21 November 2012).

[299] *Katanga and Ngudjolo* (dissenting opinion of Judge Van den Wyngaert) (n 298) para 1.

[300] *Katanga and Ngudjolo* (dissenting opinion of Judge Van den Wyngaert) (n 298) para 30.

[301] *Katanga and Ngudjolo* (dissenting opinion of Judge Van den Wyngaert) (n 298) para 31.

On appeal, there were three major questions before the Appeals Chamber: one, whether the timing of the notice, being that it was given at the deliberation stage, was in line with regulation 55; two, whether the notice of the TC was within the scope of regulation 55 in other words whether the facts and circumstances of the charges had been exceeded; and, three, whether the fair trial rights of Mr Katanga had been violated.[302] On the issue of the timing, the Appeals Chamber unanimously held that the phrase "at any time during the trial" in regulation 55 (2) meant that notice could indeed be given at any time, including at the deliberation stage.[303] The Appeal's Chamber, however, pointed out that it would be preferable to give notice as early as possible.[304]

On the question of the scope of the notice, the Majority held that it was not immediately apparent that the proposed re-characterization exceeded the facts and circumstances of the charges.[305] They concluded, in this regard, that the question could only be conclusively determined after the TC had issued the final judgment under Article 74 of the Rome Statute.[306] Lastly, on the issue of the fair trial rights, the Majority held that the question was premature since at that moment the Appeals Chamber was not in a position to determine whether the proposed re-characterization would lead to a violation of Mr Katanga's right to fair trial.[307] The Majority dismissed the appeal and upheld the TC II's decision.[308]

In his dissenting opinion, Judge Cuno Tarfusser agreed with the Majority of the Appeals Chamber on the issue of the timing of the notice.[309] However, he strongly disagreed

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[302] *The Prosecutor v. Germain Katanga* (Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled 'Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons) ICC-01/04-01/07-3363 *(21 March 2013)* [10].

[303] *Katanga* (Regulation 55 Appeals Chamber decision) (n 302) para 17.

[304] *Katanga* (Regulation 55 Appeals Chamber decision) (n 302) para 24.

[305] *Katanga* (Regulation 55 Appeals Chamber decision) (n 302) para 54.

[306] *Katanga* (Regulation 55 Appeals Chamber decision) (n 302) paras 44–47.

[307] *Katanga* (Regulation 55 Appeals Chamber decision) (n 302) para 91.

[308] *Katanga* (Regulation 55 Appeals Chamber decision) (n 302) para 106.

[309] *The Prosecutor v. Germain Katanga* (Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled 'Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons) (Dissenting opinion of Judge Cuno Tarfusser) ICC-01/04-01/07-3363 (21 March 2013) [10].

with the Majority on the scope of the application of regulation 55 and stated that the TC II had interpreted regulation 55 in a manner that was too broad.[310] In his opinion, regulation 55 could only be applied to re-characterize modes of liability from Article 25 to Article 28,[311] and vice versa, but could not be applied to change from one form of participation to another listed within Article 25.[312] He added that the application of the modes of liability under Article 25 was a contentious issue, and the fact that TC II sought to change from one form of participation to another, within Article 25, added a layer of unpredictability and uncertainty to the proceedings.[313]

On the issue of the right to fair trial, Judge Tarfusser held that the right of Mr Katanga to be informed in detail of the nature, cause, and content of the charges had been infringed.[314] In his opinion this was because the Majority in TC II failed to provide sufficient detail upon which the re-characterization would be based to enable Mr Katanga sufficiently prepare his defence.[315] He concluded that, unlike the Majority of the Appeals Chamber which had upheld the TC II decision, he would have reversed it and ordered TC II to enter an Article 74 judgment against Mr Katanga at the same time as Mr Ngudjolo, on the basis of the evidence heard.[316]

In the final judgment, the Majority in TC II, Judge van den Wyngaert dissenting, indeed modified the charges against Mr Katanga as earlier notified and found him guilty under Article 25 (3) (d) (ii), a mode which had been introduced via regulation 55.[317] It is noteworthy that the Chamber unanimously held that the OTP had not established Mr Katanga's guilt under Article 25 (3) (a) as confirmed by the PTC.[318] It can, therefore, be argued that without the re-characterization of charges at the deliberation stage,

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[310] *Katanga* (dissenting opinion of Judge Cuno Tarfusser) (n 309) para 19.

[311] Articles 25 and 28 provide for different forms of liability - article 25 which provides for individual criminal responsibility while article 28 provides for command responsibility.

[312] *Katanga* (dissenting opinion of Judge Cuno Tarfusser) (n 309) paras 10–11.

[313] *Katanga* (dissenting opinion of Judge Cuno Tarfusser) (n 309) paras 15–16.

[314] *Katanga* (dissenting opinion of Judge Cuno Tarfusser) (n 309) para 22.

[315] *Katanga* (dissenting opinion of Judge Cuno Tarfusser) (n 309) para 27.

[316] *Katanga* (dissenting opinion of Judge Cuno Tarfusser) (n 309) para 28.

[317] *The Prosecutor v. Germain Katanga* (Judgment pursuant to article 74 of the Statute) ICC-01/04-01/07-3436-tENG (7 March 2014*)* [1696].

[318] *Katanga* (Judgment pursuant to article 74 of the Statute) (n 317) para 1421.

through which the Majority in TC II introduced mode of liability under Article 25 (3) (d) (ii), Mr Katanga would have been acquitted.

The above discussion demonstrates how the regime governing re-characterization of charges at the ICC is not only important but also factually and legally complex. TC II could not reach an agreement on the application of regulation 55 to *Katanga* and Judge Van den Wyngaert, while dissenting, expressed the view that the Majority in TC II had violated the fair trial rights of Mr Katanga. Similarly, the Appeals Chamber failed to reach consensus, with Judge Cuno Tarfusser dissenting and opining that the application of regulation 55 by TC II, which was upheld by the Appeals Chamber, had violated Mr Katanga's right to be informed of the charges. The controversy surrounding this regulation continues as evidenced by its application in *Prosecutor v Bemba Gombo* (*Bemba*) where the TC gave notice of the likelihood to re-characterize the charges to include an additional form of liability under Article 28 (a) (i).[319] The Trial Chamber indeed re-characterized the charges as notified, and Mr Bemba was eventually found guilty by the Trial Chamber under Article 28 (a) (i) as modified. However, this decision was later reversed by the Appeals Chamber.[320]

The Chamber has also given notice of the possibility of re-characterization of the charges against Mr Gbagbo.[321] However, this did not materialise and Mr Gbagbo was eventually acquitted by the TC, a decision which has been appealed against by the Prosecutor.

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[319] *The Prosecutor v. Jean-Pierre Bemba Gombo* (Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court) ICC-01/05-01/08-2324 (21 September 2012) [5]. The modification introduced the "ought to have known" requirement; meaning that Mr Bemba ought to have known that the forces in his command were committing crimes under the jurisdiction of the Court.

[320] *The Prosecutor v. Jean-Pierre Bemba Gombo* (Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute") ICC-01/05-01/08-3636-Red (8 June 2018).

[321] *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé* (Decision Giving Notice Pursuant to Regulation 55(2) of the Regulations of the Court) ICC-02/11-01/15-185 (19 August 2015).

Regulation 55 remains a hotly contested provision not only among judges, as seen in the differing opinions above,[322] but also among scholars.[323] This further shows how the both legally and factually complex the law and procedure at the ICC are.

Participant complexity

The term "parties" is generally used at the ICC to refer to the prosecution and the defence while "participants" is used to refer to the victims authorised to participate through their legal representatives.[324] The term "participants" is sometimes also used to refer to the prosecution, the defence and the victims participating in the proceedings.[325] In this section, however, a wider meaning of the term participant is taken and this includes intermediaries, since they sometimes act on behalf of organs of the Court or counsel, as illustrated below. The core legal texts of the Court do not provide for the participation of intermediaries but in practice the organs of the Court and Counsel often rely on intermediaries' assistance in the field.[326] This prompted the Court to establish Guidelines Governing the Relations between the Court and Intermediaries to regulate such interactions.[327] These guidelines define an

[322] See also the opinion of Judge Joyce Alouch on this issue at Aluoch (n 287) 437.

[323] Göran Sluiter and others, *International Criminal Procedure: Principles and Rules* (OUP Oxford 2013) 433.

[324] See Christine Van den Wyngaert, 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge - Presented by the Frederick K. Cox International Law Center' (2011) 44 Case Western Reserve Journal of International Law 475, 483. (while discussing the participatory regime of victims at the ICC, she states that article 68 of the Rome Statute implies that victims are "participants" and not "parties")

[325] See, for example, regulation 55 of the Regulations of the Court which stipulates that: "if it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the *participants* of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the *participants* the opportunity to make oral or written submissions" [emphasis added]. Generally, regulation 55 notices are given to the defence, prosecution, and victims as seen for example in *Katanga and Ngudjolo* (Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons) (n 292).

[326] Aluoch (n 287) 443. (She explains how the ICC, unlike the ad hoc tribunals, often operates in regions where conflict is ongoing which necessitates the use of intermediaries to locate and contact witnesses and to improve the security of staff).

[327] 'Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel Working with Intermediaries' (n 278).

intermediary as a person who, or organisation which: "facilitates contact or provides a link between one of the organs or units of the Court or Counsel on the one hand, and victims, witnesses, beneficiaries of reparations and/or affected communities more broadly on the other."[328]

These guidelines were adopted in line with the challenges faced by the Court regarding the role and supervision of intermediaries and were later revised in line with the concerns raised in the final judgment in *Lubanga.*[329] In this case, the defence requested a permanent termination of the case and the immediate release of the accused based on an alleged grave misconduct by the Prosecutor and the intermediaries acting on behalf to the Prosecutor.[330] The defence alleged that: 1) intermediaries working on behalf of the prosecution had intentionally solicited false information aimed at the conviction of the accused; 2) the prosecution submitted the erroneous statements produced by said intermediaries without properly investigating to confirm veracity and reliability; 3) the prosecution deliberately concealed from the defence information which could seriously undermine the credibility of the intermediaries or the reliability of their testimony.[331]

In response to the defence's allegations, the prosecution admitted to having used intermediaries in the "hostile environments" within the DRC to improve the security of witnesses and staff.[332] However, the prosecution insisted that the intermediaries were only used to locate and contact witnesses and did not otherwise play a decisive role in the investigation process.[333] The prosecution denied all the allegations of the defence

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[328] 'Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel Working with Intermediaries' (n 278) 5.

[329] See *The Prosecutor v. Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06-2842 (14 March 2012) [101–215]. (where the Chamber discusses the creditability of the intermediaries and the issues arising therefrom).

[330] *Prosecutor v. Thomas Lubanga Dyilo* (Defence Application Seeking a Permanent Stay of the Proceedings) ICC-01/04-01/06--2657-tENG-Red (10 December 2010).

[331] *Lubanga* (Defence Application Seeking a Permanent Stay of the Proceedings) (n 330) paras 20–23.

[332] *The Prosecutor v. Thomas Lubanga Dyilo* (Prosecution's Response to the Defence's « Requête de la Défense aux fins d'arrêt définitif des procédures ») ICC-01/04-01/06-2678-Red (31 January 2011) [14].

[333] *Lubanga* (Prosecution's Response to the Defence's « Requête de la Défense aux fins d'arrêt définitif des procédures »*)* (n 332) paras 16–17.

asserting that there was no prosecutorial misconduct and that the question of credibility of witnesses, or reliability of evidence was an issue to be decided by the Chamber in the final judgment.[334]

The Chamber dismissed the defence's request for permanent termination of the case holding that the defence's allegation of prosecutorial misconduct, "even taken at its highest, would not justify staying the case".[335] The Chamber stated that it would decide on the impact of the involvement of the intermediaries and the allegation of prosecutorial misconduct in due course.[336] In the final judgment, the Chamber held that the prosecution had delegated its investigative duties to intermediaries in a manner that was inappropriate.[337] Three of the intermediaries acting on behalf of the prosecution were not sufficiently supervised and therefore the testimony of the witnesses who had been contacted by these intermediaries could not be "safely relied on".[338]

Similarly, the Chamber found that the prosecution had been negligent in failing to verify evidence produced through the involvement of these intermediaries before presenting the same before the Chamber. As a result of this negligence, the Chamber had spent a significant amount of time "investigating the circumstances of a substantial number of individuals whose evidence was, at least in part, inaccurate or dishonest."[339] Moreover, the Chamber found that due to the negligence of the prosecution, it was likely that the intermediaries took advantage of the witnesses they contacted who, because of their youth and exposure to conflict, were susceptible to manipulation.[340]

This is merely one example among others where the use of intermediaries has been contentious. In *Bemba*, for example, the extent to which intermediaries had assisted in the applications for victims seeking to participate in trial was the subject of litigation

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[334] *Lubanga* (Prosecution's Response to the Defence's « Requête de la Défense aux fins d'arrêt définitif des procédures ») (n 332) para 183.

[335] *The Prosecutor v. Thomas Lubanga Dyilo* (Redacted Decision on the Public 'Defence Application Proceedings') ICC-01/04-01/06-2690-Red2 (7 March 2011) [197].

[336] *Lubanga* (Redacted Decision on the Public 'Defence Application Proceedings') (n 335) para 197.

[337] *Lubanga* (article 74 judgment) (n 329) para 482.

[338] *Lubanga* (article 74 judgment) (n 329) para 482.

[339] *Lubanga* (article 74 judgment) (n 329) para 482.

[340] *Lubanga* (article 74 judgment) (n 329) para 482.

between the parties.[341] This led the Chamber to order the Victims Participation and Reparations Section to re-interview all the victims seeking to participate, who had been interviewed by questionable intermediaries, in order to verify the information provided.[342] These examples demonstrate the complexity of the challenges facing the Court as a result of the involvement of intermediaries in the proceedings.

3.2.2 Disclosure

The Prosecutor has the duty to disclose to the defence all the material in his/her possession which is relevant to the preparation of the defence case and/or which tend to prove the innocence of the accused, mitigate the guilt of the accused or affect the credibility of the prosecution's evidence.[343] Besides, the prosecution is required to perform its disclosure obligations as soon as practical and on a continuous basis.[344] Disclosure in one of the sources of continuous litigation between parties at the ICC.[345] This occurs on at least three areas: the first is the timeliness of the disclosure, where the defence often contends that the disclosure is not timely. This occurred for example in the *Kenyatta* case where a late addition of five witnesses resulted in a stay of the proceedings.[346]

The second scenario occurs when the prosecution withholds or otherwise delays the disclosure of exculpatory evidence, that is material which prove the innocence of the accused or weaken the prosecution's case. For example, in *Kenyatta*, following the defence's application, the Chamber reprimanded the prosecution for its failure to timely disclose to the defence an affidavit produced by a prosecution witness which contained

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[341] *The Prosecutor v. Jean Pierre Bemba Gombo* (Public redacted version of "Decision on the tenth and seventeenth transmissions of applications by victims to participate in the proceedings") ICC-01/05-01/08-2247-Red (19 July 2011) [10–21].

[342] *Bemba* (Public redacted version of "Decision on the tenth and seventeenth transmissions of applications by victims to participate in the proceedings"*)* (n 341) para 28.

[343] See article 67 (2) of RS and rule 77 of the RPE.

[344] 'Chambers Practice Manual, February 2016' (n 22) 10.

[345] See Xavier-Jean Keïta, 'Disclosure of Evidence in the Law and Practice of the ICC' (2016) 16 International Criminal Law Review 1018 (He discusses in detail the regime governing disclosures at the ICC and the cases to illustrate the contentious nature of this issue).

[346] *The Prosecutor v. Uhuru Muigai Kenyatta* (Decision on Defence Application Pursuant to Article 64(4) and Related Requests) ICC-01/09-02/11-728 (26 April 2013) [4–7].

exculpatory evidence.[347] Similarly in *Lubanga* the Prosecution entered into confidentiality agreements, according to Article 54 of the Rome Statute,[348] with certain information providers and declined to disclose the information received to the defence. Upon an application by the defence, the Chamber held that the prosecution had wrongly used Article 54 and that withholding confidential information from the defence constituted a breach of the rights of the accused. [349] The Chamber, therefore, decided to stay the proceedings, a decision which was upheld by the Appeal's Chamber.[350]

The third area of contention, regarding disclosures, relates to victim participation in disclosure proceedings. Generally, the victim participation regime at the ICC permits victims to participate in trials to present their views and concerns.[351] Additionally, according to the ICC jurisprudence, victims participating in the proceedings "may be permitted to tender and examine evidence if in the view of the Chamber it will assist it in the determination of the truth, and if in this sense the Court has 'requested' the evidence".[352] The question then arises as to whether victims, if allowed to tender evidence and examine witnesses, should be subject to the disclosure regime applicable to the parties. [353] The Appeal's Chamber held, in this regard, that: "if the Trial Chamber decides that the evidence (from Victims) should be presented then it

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[347] *Kenyatta* (Decision on Defence Application Pursuant to Article 64(4) and Related Requests) (n 346) para 97.

[348] Article 54 (3) (e) provides that the Prosecutor may: "Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents."

[349] *The Prosecutor v. Thomas Lubanga Dyilo* (Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain other Issues Raised at the Status Conference on 10 June 2008) ICC-01/04-01/06 (13 June 2008) [93].

[350] *The Prosecutor v. Thomas Lubanga Dyilo* (Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008') ICC-01/04-01/06-1486 (21 October 2008) [80].

[351] Article 68 of RS.

[352] *The Prosecutor v. Thomas Lubanga Dyilo* (Decision on victims' participation) ICC-01/04-01/06-1119 (18 January 2008) [108].

[353] See Keïta (n 345) 1044.

could rule on the modalities for the proper disclosure of such evidence before allowing it to be adduced."[354]

3.2.3 Lengthy proceedings

As early as 1999, before the Court came into operation, there was concern about the complex nature of the procedural law and a prediction that this would delay the processes of investigation, prosecution and adjudication.[355] The prediction turned out to be true as proceedings at the ICC take several years to be concluded. This happens for many reasons, for example, due to the complexity of the proceedings and disclosure complications which often lead to a stay in the proceedings as discussed above. Lengthy proceedings are also a result of the pre-trial stage conducted by the pre-trial chamber (PTC). As mentioned above, the drafters of the Rome Statute introduced the PTC, as a form of compromise, to protect the rights of the accused and to provide a mechanism for the judicial supervision of the Prosecutor.[356]

To perform both functions, the PTC authorises the Prosecutor to conduct investigations, upon being convinced that there is reason to believe that crimes within the jurisdiction of the Court were committed; and confirms the charges when it is convinced that there is reasonable ground to believe that the person under investigation committed the crimes.[357] In so doing, the PTC protects the rights of the person under investigation and supervises the exercise of prosecutorial powers. However, it also makes the proceedings very lengthy. For example, in the case against former President Laurent Gbagbo, the pre-trial phase lasted 925 days all of which he spent in ICC detention.[358]

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[354] *The Prosecutor v. Thomas Lubanga Dyilo* (Judgment on Appeal) ICC-01/04-01/06-1432 (11 July 2008) [100].

[355] M Cherif Bassiouni, 'Negotiating the Treaty of Rome on the Establishment of an International Criminal Court' (1999) 32 Cornell International Law Journal 443.

[356] See part 2.4.2 of this dissertation.

[357] See part 2.4.3 of this dissertation.

[358] *Prosecutor v Laurent Gbagbo and Charles Blé Goudé* (Dissenting opinion of judge Cuno Tarfusser) ICC-02/11-01/15-846-Anx (10 March 2017) [10]. The Dissenting judge argued that the accused ought to be provisionally released, *inter alia,* because his pre-trial detention had lasted much longer than that of other accused persons in the history of the ICC.

Another issue which contributes to lengthy proceedings is the language of the proceedings at the ICC. The official languages of the Court are English and French, but there is an additional requirement that the proceedings are conducted in a language which the accused fully understands.[359] Therefore, after the confirmation of charges, the TC holds a status conference with the parties and participants to determine the language of the proceedings.[360] If the language chosen is English or French, the proceedings are normally simultaneously translated to the other official language, for the Court's record.[361]

However, sometimes the proceedings have to be translated to two or three other languages apart from English and French. For example, in the case of *Banda and Jerbo* the language most fully understood by the two accused persons was Zaghawa.[362] This was further complicated by the fact that Zaghawa is not a written language and it consists of about 5000 words, therefore, many legal terms have no equivalents in this language.[363] The judges, therefore, had to come up with innovative ways to attempt to balance the right of the accused persons to an expeditious trial and the right to be tried in a language they fully understood.[364] This language complication adds to the length of the proceedings.

3.3 Political challenges

The organs of the Court often assert that the ICC is an exclusively judicial institution which is apolitical in nature.[365] However, many commentators opine that the ICC is intricately linked with politics on many levels, for example: the Rome Statute was

[359] Article 67 (f) of RS.

[360] Article 64 (3) (b).

[361] Regulation 39 of the RoC.

[362] *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus,* ICC-02/05-03/09.

[363]Aluoch (n 287) 436.

[364] See for example *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* (Order on translation of witness statements) ICC-02/05-03/09-199 (16 August 2011) [3]. See also the opinion of the presiding judge of this case in Aluoch (n 287) 436–437.

[365] 'Understanding the International Criminal Court' 5 <https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf> accessed 22 March 2018.

created in a process which involved political bargains and compromises;[366] the Court's judges and Prosecutor are elected in political processes at the ASP;[367] the Court exercises its jurisdiction in politically charged post war situations; and, the Court depends on the political will of States parties for the implementation of its decisions.[368] This part deals with three of the political challenges facing the Court namely: the apparent African bias, problems with state cooperation and the political instrumentalization of the Court by States.

3.3.1 Apparent bias against Africa

One of the perennial criticisms against the ICC concerns the Court's apparent bias against Africa. All the 11 situations under investigation are African, except Georgia, which was commenced in 2016 after years of repeated criticism.[369] In this regard, one commentator made the following statement:

> "Imagine if there were a criminal court in Britain which only ever tried black people, which ignored crimes committed by whites and Asians and only took an interest in crimes committed by blacks. We would consider that racist, right? And yet there is an International Criminal Court which only ever tries black people, African black people to be precise, and it is treated as perfectly normal."[370]

In the same vein, since 2009 the African Union (AU) has been issuing decisions condemning ICC's focus on Africa and urging States Parties not to cooperate with the ICC. The first AU decision on this issue called upon the UNSC to defer the case against former President Bashir according to Article 13 of the Rome Statute.[371] The UNSC did

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[366] See part 2.2.2 of this dissertation.

[367] See part 2.3.1 of this dissertation.

[368] See Sarah MH Nouwen and Wouter G Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2010) 21 European Journal of International Law 941, 944. (They discuss the effects of politics in the Uganda and Sudan situations at the ICC)

[369] The situations under investigation are Georgia, Burundi, Central African Republic I & II, Libya, Kenya, Darfur Sudan, Uganda, and Democratic Republic of Congo. See 'Situations' (n 173).

[370] Brendan O'Neill, The Daily Telegraph, 15 March 2012 cited in Hoile (n 112) v.

[371] African Union, (AU Assembly), 'Decision on the Appointment of Members of the African Commission on Human and Peoples' Rights'(Sirte 1-3 July 2009) Doc.EX.CL/533(XV)

not defer the case, and the AU reacted by issuing further decisions and resolutions, in January and July 2010, January and July 2011, January and July 2012; condemning the ICC's involvement in Sudan and urging AU member states not to cooperate with the ICC. [372]

The situation exacerbated in 2013 when Mr Kenyatta and Mr Ruto, who at the time were facing trial for crimes against humanity at the ICC; were elected as President and Deputy President of Kenya respectively, despite the charges against them.[373] The AU made a decision urging the ICC to withdraw the cases against the two; alternatively, the AU requested the UNSC to defer the cases.[374] When this failed, the AU began to urge its members to collectively withdraw from the ICC. In October 2016, three African States Parties to the Rome Statute (Burundi,[375] Gambia,[376] and South Africa[377])

<https://au.int/sites/default/files/decisions/9560-assembly_en_1_3_july_2009_auc_thirteenth_ordinary_session_decisions_declarations_message_congratulations_motion_0.pdf> accessed 21 February 2018.

[372] 'African Union, (AU Assembly), Decision on International Jurisdiction, Justice and The International Criminal Court (ICC)1 - Doc. Assembly/AU/13(XXI) (Addis Ababa 26 - 27 May 2013) Assembly/AU/Dec.482(XXI)' para 4 <https://au.int/sites/default/files/decisions/9654-assembly_au_dec_474-489_xxi_e.pdf> accessed 21 February 2018.

[373] 'How Kenyatta Scored Big against ICC' (*The Herald*) <https://www.herald.co.zw/how-kenyatta-scored-big-against-icc/> accessed 22 March 2018.

[374] 'African Union, (AU Assembly), Decision on International Jurisdiction, Justice and The International Criminal Court (ICC)1 - Doc. Assembly/AU/13(XXI) (Addis Ababa 26 - 27 May 2013) Assembly/AU/Dec.482(XXI)' (n 371) para 5.

[375] Burundi announced its intention in October 2016 following the ICC's decision to commence a preliminary examination in Burundi. Burundi's withdrawal became effective a year later in October 2017 see 'Burundi's Withdrawal from the ICC| African Group of Experts on International Criminal Justice' (*Home | African Group of Experts on International Criminal Justice*) <https://www.icjafrica.com/single-post/2017/10/27/Burundis-withdrawal-from-the-ICC> accessed 21 February 2018.

[376] Gambia announced its intention to withdraw in October 2016 during the post-election crisis in the country. However, in February 2017, this notice was reversed by a new president. See 'Under New Leader, Gambia Cancels Withdrawal From International Criminal Court' (*NPR.org*) <https://www.npr.org/sections/thetwo-way/2017/02/14/515219467/under-new-leader-gambia-cancels-withdrawal-from-international-criminal-court> accessed 21 February 2018.

[377] South Africa issued a notice to withdraw in October 2016. However, the High Court held that this notice was unconstitutional and invalid since there had been no parliamentary approval and ordered the withdrawal thereof. See '*Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* (83145/2016) [2017]

declared their intention to withdraw from the ICC. In 2017, the AU formulated an official ICC Withdrawal Strategy which, *inter alia*, discusses the legal regime of withdrawal, including collective withdrawal; and examines the political and legal consequences thereof.[378] In its January 2017 decision, the AU congratulated the African States which had made moves to withdraw from the ICC, while reiterating its commitment to the Withdrawal Strategy.[379]

Whether true or not, the perception that the ICC is biased against Africa affects the legitimacy of the Court because justice must not only be done but it must also be seen to be done. As Max du Plessis and other scholars observe:

> "The perception of ICC bias against Africa and lack of consistency and fairness in the way the court is implementing international criminal justice may not correspond with the true reality, but it cannot be wished away by simply being ignored. There are real issues and concerns on both sides that need to be addressed in a serious, constructive and cooperative manner through honest dialogue".[380]

3.3.2 State cooperation

States Parties have the general obligation to cooperate with the ICC in investigation and prosecution.[381] The Court has the authority to make cooperation requests to States Parties and may also request non-party states to cooperate based on *ad hoc* cooperation agreements.[382] The Court may also request cooperation and assistance

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ZAGPPHC 53; 2017 (3) SA 212 (GP); [2017] 2 All SA 123 (GP); 2017 (1) SACR 623 (GP) (22 February 2017)' para 77 <http://www.saflii.org/za/cases/ZAGPPHC/2017/53.html> accessed 21 February 2018.

[378] African Union, (AU Assembly), 'Withdrawal Strategy Draft 2' January 2017 <https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf> accessed 20 February 2018.

[379] African Union, (AU Assembly), 'Decision on the International Criminal Court (ICC)' (Addis-Ababa January 2017) Doc. EX.CL/1006(XXX) <https://au.int/sites/default/files/decisions/32520-sc19553_e_original_-_assembly_decisions_621-641_-_xxviii.pdf> accessed 20 February 2018.

[380] Max Du Plessis, Tiyanjana Maluwa and Annie O'Reilly, 'Africa and the International Criminal Court' (Chatham House 2013) <http://www.dphu.org/uploads/attachements/books/books_3820_0.pdf>.

[381] Article 86 of RS.

[382] Article 87 (1) and (5) of RS.

from intergovernmental organisations.[383] If a State Party to the Rome Statute fails to cooperate with the Court, the Court may make a finding to that effect and report the matter to the ASP or to the UNSC, the latter if the situation was referred to the Court by the UNSC.[384] Because the Court has no enforcement mechanism of its own, States parties' cooperation, is vital to its proper functioning.[385]

However, States Parties have often refused to cooperate with the ICC based on factors which appear to be more political than legal. This is illustrated, for example, by States Parties' response to the ICC request for the arrest and surrender of former President Bashir of Sudan to the ICC.[386] Chad, for example, has been a State Party to the Rome Statute since 2007 and yet hosted (then) President Bashir in its territory five times after the ICC's request for his arrest and surrender, and despite several reminders from the ICC.[387] Interestingly, in July 2009, when the AU first made the decision not to cooperate with the ICC in the arrest and surrender of former President Bashir, Chad was the only country which entered a reservation to the decision,[388] vowing to arrest him in fulfilment of its Rome Statute obligations.[389]

At that time, however, there was political strife between President Déby of Chad and former President Bashir. The conflict commenced in 2005, when the Chadian town of Adre was attacked, followed by an attempt to oust President Déby in 2006 - he blamed former President Bashir for both attacks.[390] Between the years 2005 to 2009 there was increased violence between Chad and Sudan, and many failed attempts to sign peace accords.[391] It was in this context that Chad entered the reservation to the above-

[383] Article 87 (6) of RS.

[384] Article 87 (7) of RS.

[385] Aluoch (n 287) 444.

[386] For a detailed discussion of the influence of politics on African States parties' cooperation with the ICC see Oyugi (n 116).

[387] *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (Decision Requesting Observations on Omar Al-Bashir's Visit to the Republic of Chad) ICC-02/05-01/09-147 (22 February 2013) [10–12].

[388] African Union, (AU Assembly) 'Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)' (Sirte 1-3 July 2009) Doc. Assembly/AU/13(XIII) para 10.

[389] 'Chad Urged to Execute Arrest Warrant against Sudanese Leader - Sudan Tribune: Plural News and Views on Sudan' <http://www.sudantribune.com/spip.php?article45845> accessed 22 March 2018.

[390] Oyugi (n 116) 113.

[391] Oyugi (n 116) 113–114.

mentioned AU decision and indicated its intention to arrest former President Bashir. A final peace accord was signed in 2010 which saw the cessation of violence between the two countries. Subsequently, Chad disregarded its cooperation obligation to the ICC and invited and hosted former President Bashir five times despite repeated calls for cooperation from the ICC.[392] This illustrates the influence of politics on States Parties' decision on whether to cooperate with the ICC. Apart from Chad, other States parties to the Rome Statute, for example Kenya, Malawi, Uganda, Jordan, Nigeria, and South Africa, among others, have refused to cooperate with the ICC in the arrest and surrender of former President Bashir.[393]

Consequently, the Prosecutor was forced to hibernate investigative activities in Darfur.[394] In her statement to the UNSC on this issue, the Prosecutor decried the UNSC's "lack of foresight" in dealing with the Darfur issue and urged for "a dramatic shift" in the UNSC's approach to arresting persons accused of committing crimes in Darfur.[395] Furthermore, the Prosecutor called upon all States and the UNSC "to find creative ways to support those amongst them that may be most vulnerable to planned visits by Mr. Omar Al Bashir or other individuals against whom warrants of arrest have been issued."[396] However, the Prosecutor's plea has been in vain and the case remains hibernated.

3.3.3 Political instrumentalization of the Court

Since the coming to force of the Rome Statute, states and non-state actors have attempted to instrumentalise the Court to attain political ends. Commenting on this issue, the late ICC judge Kaul stated as follows:

> "There is a further phenomenon, a further challenging reality which can affect the Court's international position or make its work the subject of international debate or even controversy: this concerns the temptation for some States,

[392] Oyugi (n 116) 114.

[393] See a detailed discussion of this in Oyugi (n 116) 105–116.

[394] Fatou Bensouda, 'Statement to the United Nations Security Council on the Situation in Darfur, Pursuant to UNSCR 1593 (2005)' (International Criminal Court 2014) para 4 <https://www.icc-cpi.int/iccdocs/otp/stmt-20threport-darfur.pdf>.

[395] Bensouda (n 394) paras 4 and 13.

[396] Bensouda (n 394) para 13.

> including powerful States and permanent members of the Security Council to somehow instrumentalise the Court, to use it for their political purposes and interests. As a former German Ambassador, who is now a Judge and Vice-President of the ICC I am neither blind nor naïve in this regard"[397]

Furthermore, Nouwen and Werner opine that the place of the ICC as a criminal court with global reach, which embodies universal norms, makes it a powerful tool in international politics.[398] They further explain that when the ICC declares that a person/group committed international crimes and labels the person/members of the group as war criminals, the group/person is generally viewed as an enemy of the international community or as the "enemy of humanity itself".[399] On the other hand, if a state or organisation cooperates with the ICC, it is seen as a friend of the ICC and therefore a friend of the international community by extension.[400] The ICC's involvement in the Northern Uganda situation illustrates the friend/enemy dichotomy.

As discussed briefly in Chapter 2 above, the Lord's Resistance Army (LRA) and the Uganda People's Defence Force (UPDF) had been involved in conflict for about 17 years before the Government referred the situation to the ICC in 2004. Being that the situation in Northern Uganda was self-referred, the ICC could not be accused of infringing the sovereignty of Uganda; which made the situation perfect for the prosecution's first investigation.[401] However, the referral has been said to have been made as "part of a military strategy and international reputation campaign, rather than out of a conviction about law and justice."[402] In other words, it is widely believed that the referral was motivated by the desire of the Ugandan Government to intimidate the LRA, a rebellion which the government had not been able to quell for close to two

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[397] See Hans-Peter Kaul, 'The International Criminal Court – Current Challenges and Perspectives' (Salzburg Law School on International Criminal Law, 8 August 2011) 10 <https://www.icc-cpi.int/nr/rdonlyres/289b449a-347d-4360-a854-3b7d0a4b9f06/283740/010911salzburglawschool.pdf> accessed 9 February 2018.

[398] Nouwen and Werner (n 368) 962.

[399] Nouwen and Werner (n 368) 962.

[400] Nouwen and Werner (n 368) 962.

[401] See Nouwen and Werner (n 368) 953.

[402] Nouwen and Werner (n 368) 949.

decades; by turning the LRA into enemies, and the Ugandan government into a friend, of the international community.[403]

In this regard, the Ugandan government seems to have been successful, because: one, the Prosecutor only indicted the LRA members and turned a blind eye on the alleged crimes of the UPDF; two, the Ugandan government secured permission to go into the Democratic Republic of Congo (DRC) in search of the LRA members; and, secured the assistance of the international community, namely the US, in looking for the LRA in Sudan.[404] However, in 2006-2008 during the Juba talks,[405] the Ugandan government sought to sign a peace treaty with the LRA, but the latter conditioned their cooperation on the withdrawal of the ICC cases.[406] The Ugandan government attempted to resolve the stalemate by creating a domestic court to try the LRA members; but the ICC refused to withdraw the cases already instituted and, therefore both domestic and international cases continued simultaneously.[407] The Ugandan government later withdrew its support for the ICC and has been contemplating withdrawal from the Rome Statute.[408] This shows that Uganda supported the ICC when it helped solve the LRA problem, however, when the ICC cases became an impediment to the signing of a peace treaty, Uganda withdrew its support and has been pushing

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[403] Nouwen and Werner (n 368) 949; Adam Branch, 'Uganda's Civil War and the Politics of ICC Intervention' 21 Ethics & International Affairs 179, 183.

[404] Nouwen and Werner (n 368) 950–951.

[405] Peace talks between the Ugandan government and the LRA held in Juba, South Sudan aimed at restoring peace in Northern Uganda.

[406] Dylan Hendrickson and Kennedy Tumutegyereize, 'Dealing with Complexity in Peace Negotiations: Reflections on the Lord's Resistance Army and the Juba Talks' (Conciliation Resources 2012) <http://www.operationspaix.net/DATA/DOCUMENT/6894~v~Dealing_with_Complexity_in_Peace_Negotiations__Reflections_on_the_Lord_s_Resistance_Army_and_the_Juba_Talks.pdf> accessed 22 March 2018.

[407] Lino Owor Ogora, 'How the Trial of Dominic Ongwen Has Shaped Attitudes toward International Criminal Justice in Uganda' (*Justice Hub*, 18 August 2017) <https://justicehub.org/article/how-trial-dominic-ongwen-has-shaped-attitudes-toward-international-criminal-justice-uganda> accessed 22 March 2018.

[408] 'Uganda's Ambiguous Relationship with the ICC Amidst Ongwen's Trial' <https://www.ijmonitor.org/2017/12/ugandas-ambiguous-relationship-with-the-icc-amidst-ongwens-trial/> accessed 22 March 2018.

for withdrawal from the ICC. This is one example of how states tend to use the ICC as an instrument to deal with political problems in their territories.

3.4 Victim participation and reparation

A victim is defined as a person who has suffered direct harm or an organisation which has sustained harm to its property as a result of the commission of crimes within the jurisdiction of the ICC.[409] Article 68 (3) of the Rome Statute provides that victims shall be allowed to present their views and concerns on issues that affect their personal interest, while Article 75 provides that the Court shall establish a system for reparations which includes *inter alia*, compensation, restitution and rehabilitation. A number of sections/units have been established to deal with different aspects of victim participation and reparation: the Victims Participation and Reparations Section (VPRS) which receives and processes the applications of victims who wish to participate; the victims Witness Unit (VWU) which deals with the protection of victims who also appear as witnesses during the Court's proceedings; the Office of Public Counsel for the Victims (OPCV) which provides legal counsel to victims; and, the Trust Fund for Victims (TFV) which focuses on reparation.[410]

Victims who wish to participate in the proceedings are invited to submit their applications through the VPRS.[411] In some cases, thousands of victims make applications which are notified to the defence and prosecution who then present their views on whether these victims should be allowed to participate in the proceedings, according to Rule 89 of the RPE. However, most of the identifying details of the victims are redacted to avoid identification by the parties therefore the submissions made by the parties are often abstract.[412] Upon receipt of the parties' submissions, the judges analyse each victim application individually to determine which victims may be allowed to participate; they may accept or reject the applications.[413]

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[409] Rule 85 of the RPE.

[410] 'Victims' <https://www.icc-cpi.int/about/victims> accessed 22 March 2018.

[411] 'Victims' (n 410).

[412] Van den Wyngaert (n 324) 482.

[413] The application may be rejected if the applicant does not satisfy the requirement of article 68 (3) of the RS. Victims whose applications are denied may apply to participate in another phase of the proceedings. See Rule 89 (2) of the RPE.

The victims permitted to participate in the proceedings are then represented by a common legal representative of victims (LRV).[414] Since victims are only allowed to express their views and concerns when their personal interests are affected, the LRV often applies to the Chamber seeking permission to participate. The Chamber generally decides these issues on a case-by-case basis considering the views of the parties.[415] Generally, the LRV makes submissions on various aspects of the trial, which the Chamber considers alongside those of the parties. Victims may also question the witnesses presented by the defence and prosecution and are also permitted to adduce evidence and to appear as witnesses independent of the prosecution and the defence.[416]

The Trust Fund for Victims (TFV), established under Article 79 of the Rome Statute, deals with issues of reparation parallel and simultaneous to the proceedings at the ICC. The TFV implements the reparation decisions made by the Court and offers physical and psychosocial rehabilitation and/or material support for the victims of crimes which are before the Court.[417] The TFV is funded through fines and forfeitures of convicted persons as well as donations from states or individuals.[418] In case of conviction, the ICC begins to consider the issues of reparation even if there is a pending appeal.[419] There have so far been three reparation orders issued in *Lubanga*, *Katanga* and *Al Mahdi*.[420]

The victim participation and reparation regime at the ICC is considered a breakthrough in the field of international criminal justice.[421] This is because the statutes of the preceding international tribunals did not provide for victim participation, except as witnesses, nor did they provide for reparation; these regimes were believed to result in

[414] Rule 90 of the RPE.

[415] Van den Wyngaert (n 324) 482.

[416] *Lubanga* (Decision on victims' participation*)* (n 352) para 108.

[417] 'Our Work | The Trust Fund for Victims' <https://www.trustfundforvictims.org/en/what-we-do/projects> accessed 22 March 2018.

[418] Article 79 (2) of RS; 'Our Work | The Trust Fund for Victims' (n 417).

[419] See for example 'Bemba Case' <https://www.icc-cpi.int/car/bemba> accessed 22 March 2018.

[420] 'Reparation Orders | The Trust Fund for Victims' <https://www.trustfundforvictims.org/en/what-we-do/reparation-orders> accessed 22 March 2018.

[421] Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge University Press 2013) 292.

secondary victimization of victims.[422] To remedy this deficiency, and to ensure the achievement of the rights of victims, the drafters of the Rome Statute incorporated the provisions of the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.[423] The principles incorporated in the legal texts of the ICC are aimed at achieving the procedural rights of victims for example – right to the truth, right to be informed and the right to reparations.[424]

However, the challenges faced by this regime so far leads to questions whether victim participation and reparation at the ICC is meaningful or whether it is merely symbolic.[425] For example, in *Lubanga*, the Court ordered symbolic and service-based reparation which means that the individual victims participating in this case will not receive any personal reparation.[426] In this regard, the TFV recommended, and the Chamber approved, the construction of three community centres to be used for the rehabilitation of former child soldiers to help with their reintegration into the society.[427] The TFV is complimenting the reparation programme to an amount of one million euros. However, Mr Lubanga was declared indigent and at the time of writing, there had been no contributions earmarked for the reparation of victims in this case.[428] The availability of funds could negatively affect the size and extent of a reparations award.[429]

If the participation and reparation regime at the ICC turns out to be merely symbolic it would lead to secondary victimization of victims, which the *ad hoc* tribunals were accused of. Since the ICC has conducted extensive outreach programmes[430] that may have raised victims' hopes for meaningful participation and reparation, this could also

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[422] Van den Wyngaert (n 324) 494.

[423] UN General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power: Resolution / Adopted by the General Assembly, 29 November 1985, A/RES/40/34 <http://www.un.org/documents/ga/res/40/a40r034.htm>.

[424] Van den Wyngaert (n 324) 495.

[425] Van den Wyngaert (n 324) 494–496.

[426] *The Prosecutor v Thomas Lubanga Dyilo* (Order for reparations) ICC-01/04-01/06-3129-AnxA (3 March 2015) [53].

[427] 'Reparation Orders | The Trust Fund for Victims' (n 420).

[428] 'Reparation Orders | The Trust Fund for Victims' (n 420).

[429] 'Reparation Orders | The Trust Fund for Victims' (n 420).

[430] 'Interacting with Communities Affected by Crimes' <https://www.icc-cpi.int/about/interacting-with-communities> accessed 22 March 2018.

lead to the disillusionment of victims. To solve this problem, former ICC Judge Van den Wyngaert suggests that the rights of victims may be achieved better by separating victim participation and reparation from the criminal trial at the ICC, to be dealt with by a separate Trust Fund for Victims Reparations Commission.[431] According to this view, this separation would ensure that reparations run concurrently with prosecution and therefore whether victims receive reparations is not determined by conviction. It would also save enormous resources - in terms of time and money - currently consumed by the attachment of victim participation and reparation regime at the ICC.[432] The implementation of the victim participation and reparation regime in a manner which avoids the disillusionment of victims, while protecting the rights of the accused persons, is still "work in progress" at the ICC.[433]

3.5 Conclusion

This chapter has discussed the challenges facing the ICC, most of which arise from its unique and novel legal structure and procedure. These challenges are varied and complex and have been discussed in three main categories that is: one, the legal and procedural challenges which include the complexity of the proceedings, the technicalities of disclosures and various factors leading to lengthy proceedings; two, political challenges such as the apparent bias against Africa, problems with state cooperation, as well as political instrumentalization of the Court; and three, challenges facing the implementation of the victim participation and reparation regime. The main objective of the chapter was to show an appreciation of some of the challenges facing the ICC, as a background to discussing whether plea negotiation may be a solution. The next chapter will analyse the use of plea negotiation in national jurisdictions.

[431] Van den Wyngaert (n 324) 496.

[432] Van den Wyngaert (n 324) 496.

[433] Aluoch (n 287) 450.

CHAPTER 4: APPROACHES TO PLEA NEGOTIATION IN NATIONAL JURISDICTIONS

4.1 Introduction

Chapter 3 dealt with challenges facing the ICC as a step towards answering the main question of this dissertation – whether plea negotiation could be a solution to some of the challenges facing the Court. This chapter examines the approaches towards plea negotiation in selected national jurisdictions. The justification for this analysis is that plea negotiation, as practiced at international tribunals (the ICTY, ICTR and potentially the ICC), is informed by the practice of the same in national jurisdictions, where the practice originated. The origins of formal plea bargaining are Anglo-American and therefore the practice is more prevalent in common law jurisdictions. However, as legal systems continue to interact and evolve, certain aspects of plea negotiation have been adapted by some civil law jurisdictions as discussed below.

This chapter aims to look at plea negotiation as practiced in the selected common law systems and the variations of the practice which have been introduced in some civil law systems. The comparison between common law and civil law practices is essential, because, as discussed in Chapter two of this dissertation, the criminal procedure at the ICC is informed by practices from both legal systems, creating a *sui generis* criminal procedure. This chapter contains six parts including this introduction. Part two deals with the definition, origin and justification of the plea negotiation as well as the reason for development of plea negotiation in various jurisdictions. Part three analyses some of the salient features of negotiated justice in four jurisdictions: Kenya, South Africa, France and Germany.

These countries were chosen because: one, even though they have separate legal cultures, South Africa and Kenya are both common law jurisdictions while France and Germany are civil law jurisdictions, they are representative of comparative legal systems globally; two, since they are all states parties to the Rome Statute, they are representative of the legal systems at the Assembly of States Parties. Furthermore, South Africa and Germany both played important roles in the drafting of the Rome Statute as members of the Like-Minded Group. Therefore, the criminal procedures of

these four countries are relevant to the development of ICC jurisprudence and legal culture.

Part four is a comparative analysis of plea negotiation in the four jurisdictions on five thematic areas: prosecutorial discretion versus compulsory prosecution and how each impacts on plea negotiation; the role of the prosecution, defence, judges and victims in negotiation and entering a plea agreement; the bargain with serious crimes; the types of bargains in each jurisdiction – sentence bargain versus charge bargain; and, the effect of admission of guilt. Part five deals with a critique of plea negotiation – pointing out its advantages, that is the economics of plea negotiation, on one hand; and its limitations on the other hand. Part six deals with the chapter conclusions.

4.2 Development and justification of plea negotiation

4.2.1 Definition and scope

Plea bargaining is a controversial term and it follows that there is no universally accepted definition of it. In the United States of America (US),[434] plea bargaining is understood as negotiation, between the prosecution and the defence, which lead to the accused person waiving the right to trial, and self-convicting via a guilty plea; in exchange for some concession, usually in the form of an amendment of the charge to a lesser one, dropping of additional charges or reduction of the sentence.[435] However, the practice, even in common law jurisdictions, is not uniform; and there are common law countries which avoid the term plea bargaining altogether, preferring to use terms such as plea negotiation in Australia, resolution discussions in Canada, and plea

[434] About 90% of criminal cases in both state and federal courts in the US are resolved by way of plea bargaining, making the US an authority in the practice. See Donald J Newman, *Conviction: The Determination of Guilt or Innocence without Trial* (Little, Brown 1966) 3; see also Peet M Bekker, 'Plea Bargaining in the United States of America and South Africa' (1996) 29 Comparative and International Law Journal of Southern Africa 168, 169–170.

[435] See for example Albert Alschuler, 'Plea Bargaining and Its History' (1979) 79 Columbia Law Review 1, 3 (the author defines plea bargaining as "the exchange of official concessions for defendant's act of self-conviction."); see also George Fisher, 'Plea Bargaining's Triumph' (2000) 109 The Yale Law Journal 857, 872.

discussions in England and Wales.[436] This is perhaps because the term 'bargain' has a negative connotation which implies deal making or bartering with alleged criminals and which seems repugnant to justice and public interest.[437] Besides, the perception and practice of plea bargaining varies from country to country even among common law jurisdictions.[438]

This difference is starker when it comes to civil law jurisdictions which generally do not use the term plea bargaining. To begin with, civil law jurisdictions, for reasons which will be explained below, do not have the concept of a guilty plea.[439] The defendant does not plead guilty or not guilty, instead a judge conducts investigations and collects evidence which is then made available to both the prosecutor and the defence. Therefore, in civil law jurisdictions which recognise negotiated resolutions of criminal cases, discussions are often held between the defendant, prosecutor and a judge which may or may not lead to a confession by the defendant. However, such admission of guilt, if it occurs, is considered as part of the evidence on the case record and does not lead to automatic conviction, but merely serves as evidence in the trial.[440] Again, the practice varies from one civil law jurisdiction to another and this will be exemplified below by comparing the practice in France and Germany.[441]

This chapter interprets the term plea negotiation very broadly to encompass varied forms of negotiated resolution of criminal cases with at least three essential elements: negotiation between parties with or without the involvement of a judge, admission of guilt by the defendant, and/or, benefit accruing to the offender which would otherwise not accrue without the admission of guilt. This includes equivalents in both civil law and common law jurisdictions regardless of the differences in the terms used in the various

[436] Carol A Brook and others, 'A Comparative Look at Plea Bargaining in Australia, Canada, England, New Zealand, and the United States' (2016) 57 William and Mary Law Review 1147.

[437] Brook and others (n 436) 1153; Bekker (n 434) 173.

[438] See generally Brook and others (n 436) which compares plea bargaining in Australia, Canada, England, New Zealand, and the US.

[439] Maximo Langer, 'From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and The Americanization Thesis in Criminal Procedure' (2004) 45 Harvard International Law Journal 1, 22.

[440] Langer (n 439) 22–24.

[441] See generally Langer (n 439) who compares the equivalent of plea bargaining in Germany, France, Italy and Argentina, all civil law jurisdictions.

jurisdictions, or the effect of the admission of guilt – whether it leads to conviction or is merely evidence at trial. The reason for considering both civil law and common law jurisdictions is because the procedural law, and specifically Article 65 of the Rome Statute which deals with the admission of guilt, is informed by practices from these two principal legal systems.[442]

4.2.2 The development of plea negotiation

Plea negotiation is thought to have Anglo-American origins but this is true only if one sticks to the formal version of it predominantly practiced in the US, meaning "the exchange of official concessions for a defendant's act of self-conviction."[443] However, if one takes into consideration all forms of consensual resolution of criminal cases and abbreviated criminal proceedings, one finds that the practice follows a long tradition which is prevalent in both civil and common law jurisdictions.[444] In fact, in many pre-modern societies, in various parts of the world, criminal cases were resolved through the admission of guilt by the offender, expression of remorse and some form of compensation to the victim, [445] a method which is referred to as restorative justice.

There are at least two theories in literature explaining why formal plea negotiation developed. The first, and the mainstream one, is that it developed to deal with caseload pressure. The second is that it developed due to the complexity of the trial process which itself came about due to the involvement of lawyers.

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[442] See part 2.4.2 of this dissertation.

[443] Alschuler, 'Plea Bargaining and Its History' (n 435) 3.

[444] Robert R Strang, 'Plea Bargaining Cooperation Agreements and Immunity Orders' 115th International Training Course visiting Experts Papers 30.

[445] See for example Antony Musson, 'Wergeld: Crime and the Compensation Culture in Medieval England' (Museum of London, 5 October 2009) <https://www.gresham.ac.uk/lectures-and-events/wergeld-crime-and-the-compensation-culture-in-medieval-england> accessed 20 March 2019 (the author discusses the concept of wergeld in Anglo-Saxon society where the offender would pay money to the victim in compensation for harm done) . See also Kwaku Osei-Hwedie and Morena Rankopo, 'Indigenous Conflict Resolution in Africa: The Case of Ghana and Botswana' in Bertha Osei-Hwedie, Treasa Galvin and Hideaki Shinoda (eds), *Indigenous Methods of Peacebuilding* (IPSHU English Research Report Series 29, 2012) 46-47 discussing dispute resolution mechanisms in indigenous African communities.

Caseload pressure

One common reason for the introduction of plea negotiation in both common law[446] and civil law[447] jurisdictions, has been the need to find a practical solution to the problem of caseload pressure. The introduction of plea negotiation often follows an influx of criminal cases, arising for example, due to immigration[448] or a rapid increase in the crime rate,[449] thereby putting pressure on the justice system. Pressure on the justice system gives rise to the need to resolve cases in a faster and more efficient manner. Plea negotiation is therefore resorted to, not for ideological reasons, but rather for practical reasons being to ease the pressure on the justice system. Langbein states, regarding the US, that the raison d'etre of plea negotiation is "nothing more than simple expediency. We indulge in this practice of condemnation without adjudication because we think we have to, not because we want to."[450] This theory has been criticised by some scholars for lack of empirical data, nevertheless, many scholars continue to believe that caseload pressure is a determinant of whether plea negotiation is practised and on which cases.[451]

Legal complexity

The history of formal plea negotiation might be divided into at least three phases: pre-nineteenth century, mid-nineteenth century to mid-twentieth century (1960s) and modern practice. Before the nineteenth century, trials in England and the American

[446] Bekker (n 434) 179 (the author states that the major rationale for the introduction of plea bargaining in the US is to ease the caseload pressure).

[447] Langer (n 439) 37 (the author argues that despite the apparent incompatibility between plea bargaining and the inquisitorial system, many civil law countries have incorporated the practice to ease caseload pressure); see also Kyle McCleery, 'Guilty Pleas and Plea Bargaining at the Ad Hoc Tribunals: Lessons from Civil Law Systems' (2016) 14 Journal of International Criminal Justice 1099, 1112; Yue Ma, 'Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective' (2002) 12 International Criminal Justice Review 22, 39.

[448] See Fisher (n 435) 865.

[449] Langer (n 439) 37.

[450] John H Langbein, 'Land without Plea Bargaining: How the Germans Do It' (1979) 78 Michigan Law Review 204, 205.

[451] Bekker (n 434) 179–180.

colonies, were typically simple, short and quick.[452] There was no involvement of lawyers - victims of crimes played the part of prosecutor and the defendants spoke on their own behalf, without legal representation. There were no elaborate rights of the accused person, in fact, accused persons generally did not have much say during trial except when pleading for leniency. There were also no complex rules of criminal procedure and the proceedings were dominated by the judge, who was often the only one in the courtroom who was trained in law. The judge asked questions to the parties and to witnesses and directed the jury. The judge and the jury often concluded many felony cases in one sitting, often without taking a break in between cases and without resorting to plea negotiation.[453]

However, from the mid-nineteenth century onwards lawyers started becoming involved in criminal trials by advising and acting on behalf of both the victim and the accused. With the involvement of lawyers, the nature of trial changed. For example, criminal trials become more party dominated and the role of the judge also changed to that of a referee between the parties. Furthermore, there was the development of complex criminal procedure, introduction of stringent rules of evidence, as well as a change regarding the nature and types of witnesses.[454] The result was that criminal trials became lengthier and more complex; and, as the parties were generally represented by lawyers the practice of guilty pleas and plea negotiation began to emerge.[455]

These two theories explain the development of plea negotiation in the US and England. Below is a short country specific explanation of the development of plea negotiation in Kenya, South Africa, France and Germany.

Kenya

Kenya, being a former British colony, inherited most of the English criminal procedure practices including plea bargaining, and therefore for a long time, plea bargaining was

[452] Malcolm M Feeley, 'Legal Complexity and the Transformation of the Criminal Process: The Origins of Plea Bargaining International Conference on Rights of the Accused, Crime Control and Protection of Victims: II. Plea-Bargaining' (1997) 31 Israel Law Review 183, 190.

[453] John Langbein, 'Understanding the Short History of Plea Bargaining' (1979) 261–265; Feeley (n 452) 190.

[454] Feeley (n 452) 204.

[455] Langbein, 'Understanding the Short History of Plea Bargaining' (n 453) 265.

practised in Kenya without statutory guidelines. One of the earliest authorities for plea bargaining in Kenya is *Adan v the Republic*, a 1973 case where the Court of Appeal set out the rules and procedural guidelines for plea bargaining.[456] Plea bargaining continued to be practiced in this manner until the Criminal Procedure Code was amended in 2008 and again in 2012 to include sections 137 A to 137 O which deal with the negotiation of a plea agreement, validity of a guilty plea, withdrawal of the same, as well as the procedural safeguards and sentencing among other matters.

Furthermore, in 2018 the Attorney General made the Criminal Procedure (Plea Bargaining Rules), 2018 which supplement the provisions of the Criminal Procedure Code.[457] These rules were introduced as part of a reform to the criminal justice system which is characterised by huge backlog of cases in the judiciary and overcrowded prisons which currently house triple their capacity. Plea bargaining is therefore envisioned as one of the tools essential "to ensure speedy disposal of cases and ultimately reduce the number of remand prisoners."[458] Subsequently, in 2019, the Office of the Director of Public Prosecutions (ODPP) in Kenya formulated plea bargaining guidelines to guide the Kenyan prosecutors in the process of negotiating plea agreements.[459]

South Africa

Because of its colonial history, South Africa's legal culture is influenced by both English law and Roman-Dutch law, and therefore, like Kenya, South Africa has a long history of plea bargaining, much of which was undocumented, irregularly practiced and unregulated by statute.[460] One scholar, Bennun, recalls that plea bargaining in the 1960s was a shameful practice in which the defendants who were mostly black, poor and illiterate were assisted by counsel who were generally white and inexperienced

[456] *Adan Inshair Hassan v Republic* 1973 EALR 445.

[457] 'Criminal Procedure (Plea Bargaining Rules), 2018' <http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2018/47-CriminalProcedure_PleaBargaining_Rules_2018.pdf> accessed 12 May 2019.

[458] 'The Prosecutor: A Newsletter from the Director of Public Prosecutions' 14 <http://www.odpp.go.ke/wp-content/uploads/2019/01/ODPP-Newsletter-Issue-No.-001.pdf> accessed 12 May 2019.

[459] Office of the Director of Public Prosecutions (n 4).

[460] Bekker (n 434) 218.

and who were not paid for their services. To make things worse, there often was a language barrier between the accused and counsel who were unable to communicate with each other. He states that plea bargaining was "inadequate work done impatiently" and though proceedings were shortened for the convenience of counsel and judges, not much justice was done to the accused persons.[461] Therefore, the amendment of the South African Criminal Procedure Act of 1977 to include rules on plea bargaining was a welcome occurrence.[462] These provisions confirm the legality of plea bargaining in South Africa and regulate the practice as discussed below.

France

The French Criminal Procedure Code did not provide for any form of plea negotiation until 2004 when the concept of *comparution sur reconnaissance préalable de culpabilité* (CRPC), which translates to appearance after admission of guilt, was introduced.[463] However, before then, prosecutors engaged in a practice known as *correctionnalisation,* a form of charge bargaining discussed below, which arose from practice and has never been incorporated in statute. As discussed below, some commentators argue that this practice is illegal since it is not provided for in written law but that notwithstanding, the practice continues to thrive and seems to have received general acceptance among legal practitioners in France. However, because of its informal nature, it is not clear for how long the practice of *correctionnalisation* has existed in France.

Germany

Traditionally, Germany did not practice any form of plea negotiation[464] and therefore the introduction of the practice of *absprachen* in the 1970s was controversial because it lacked legal foundation. This was partly because the principle of compulsory

[461] Mervin E Bennun, 'Negotiated Pleas : Policy and Purposes' (2007) 20 South African Journal of Criminal Justice 17, 18.

[462] The South African Criminal Procedure Second Amendment Act 62 of 2001, s 1.

[463] See the French Code of Criminal Procedure, s 495-7 to 495-16.

[464] Langbein, 'Land without Plea Bargaining' (n 450) (the author refers to Germany as the 'land without plea bargaining'). Although there is evidence that by 1979, when this article was published, plea bargaining was being practiced secretly in Germany. See for example, Joachim Herrmann, 'Bargaining Justice - A Bargain for German Criminal Justice Essay' (1991) 53 University of Pittsburgh Law Review 755, 755.

prosecution in Germany requires that all serious offences must be tried if there is sufficient evidence, therefore many perceived bargains as repugnant to criminal justice. In fact, the practice was so taboo that it was practised in secret, only coming to the limelight through an Article published under a pseudonym in a German law journal, which sparked controversy and debate.[465] While deciding on this controversy the court held that agreements between the prosecutor, defence and/or judge were legal if they were in accordance with the principles of fair trial and the fundamentals of German criminal procedure, that is: compulsory prosecution, the requirement that a judge conduct investigations to establish the facts of the case, and that punishment should correspond to the accused's guilt.[466]

The practice of *absprachen* arose, not from the criminal procedure code, but rather as a matter of necessity in response to the day-to-day challenges facing the practitioners of criminal justice. Although there was controversy surrounding the practice, many German practitioners and scholars thought it was beneficial and were in favour of letting the practice evolve as the courts set the guidelines on a case-by-case basis.[467] One scholar explains this phenomenon by stating that judges, prosecutors and defence counsel began to re-conceptualize their role as one of cooperating with one another, and with the accused person, and using criminal law as an instrument to solve social problems and thereby to serve justice.[468] Some of these social problems were white-collar crimes, tax evasion, drug offences and crimes against the environment which brought about complex legal and evidentiary problems and increased the caseload of German courts; which then gave rise to *absprachen* as one of the solutions.[469] Eventually, in 2009, the German Federal government passed a Bill for the Regulation of Agreements in the Criminal Procedure which provided for agreements and codified the principles enunciated by the courts over the years.[470]

[465] Herrmann (n 464) 756, 766–767.

[466] Herrmann (n 464) 768.

[467] Herrmann (n 464) 771.

[468] Herrmann (n 464) 775.

[469] Ma (n 447) 36; Herrmann (n 464) 756; McCleery (n 447) 1113.

[470] These rules are incorporated in sec 257 of the German Criminal Procedure Code discussed below.

4.3 Salient features of plea negotiation in common law and civil law jurisdictions

There are a lot of differences between common law and civil law systems, the main one being that common law countries generally practice the adversarial system, while civil law jurisdictions generally practice the inquisitorial system.[471] Comparative literature highlights the similarities and differences between these systems and demonstrates that over the years there have been transplants between the two systems and therefore no system is purely adversarial or inquisitorial.[472] This section will highlight a few of the differences which persist between these systems and which impact on plea negotiation.

The main difference between the adversarial and inquisitorial systems is that the adversarial system focuses on resolution of disputes between two opposing parties, the prosecution and the defence, before an impartial decision maker - usually a judge and a jury, or before a presiding judicial officer without lay participation. On the other hand, an inquisitorial system focuses on the conduct of investigation by an impartial agent of the state with a view to arriving at the material truth. [473] This legal-cultural difference affects their perception of justice, as well as the procedure they adopt to arrive at justice. This, therefore, affects the parties who play a role in plea negotiation in common law and civil law countries; that is whether the judge or victims are involved in negotiation, and to what extent. This also determines the effect of an accused person's admission of guilt: that is whether it leads to automatic conviction which occurs in common law countries, or whether the judge is obligated to find more evidence as in civil law countries. These factors are discussed in more detail below.[474]

There are also procedural differences between the two systems, for example, at the commencement of trial in inquisitorial systems, the defendant is called upon to give evidence first. On the other hand, in adversarial systems, the prosecution case is presented first followed by the defence case. Similarly, in civil law jurisdictions

[471] Martin Kerscher, 'Plea Bargaining in South Africa and in Germany' (LLM Thesis, Stellenbosch Univeristy 2013) 20–21 (the author discusses in what regions the two systems arose and how) .

[472] See for example Langer (n 439).

[473] Langer (n 439) 4; McCleery (n 447) 1110.

[474] See parts 4.4.1 and 4.4.4 below.

investigations are conducted by the prosecutor and/or an investigating judge, who investigates both inculpatory and exculpatory evidence, and all the findings are compiled in a dossier which is then made accessible to all parties.[475] On the other hand, in common law jurisdictions investigations are conducted by the police or investigative agencies and presented to the prosecutor for review. The prosecutor is obligated to consider both inculpatory and exculpatory evidence but often times leans more towards inculpatory evidence, as this goes to prove the prosecution case; only aspects of this evidence is disclosed to the defence which generally conducts its own investigations and builds a defence case.[476]

Furthermore, in civil law jurisdictions witnesses belong to the court, and therefore there are no defence or prosecution witnesses. Generally, the judge poses the most questions to witnesses and to the accused, while the prosecution and defence counsel only ask supplementary questions. For this reason, inquisitorial proceedings are generally referred to as judge-centred. On the other hand, in adversarial proceedings, witnesses are either prosecution witnesses, who are expected to give inculpatory evidence against the accused person; and defence witnesses who are expected to give exculpatory evidence. Therefore, there is usually examination-in-chief conducted by the calling party, followed by cross-examination conducted by the non-calling party, and concluded by re-examination by the calling party. Proceedings in adversarial proceedings are therefore party centric.[477]

It is noteworthy that no system is entirely adversarial or inquisitorial and most systems have elements of both to some or other degree. For ease of discussion, this chapter refers to the practices of Kenya and South Africa, both which are majorly adversarial on the one hand; and Germany and France, both of which are largely inquisitorial.

4.3.1 Kenya

When an accused person appears before the court for the first time, an official of the court reads the charges against him/her in a language they fully understand, and the essential elements of the crimes are explained to the accused by the court. The

[475] Langer (n 439) 14–15.

[476] See generally Ma (n 447).

[477] See generally Langer (n 439).

accused is then asked to plead, and in this regard, an accused may enter a plea of: guilty, not guilty, or guilty subject to a plea agreement.[478] If the accused admits to the elements of the crime, without a plea agreement, the court is required to record the response of the accused, as closely as possible in the words used by the accused. The prosecutor is then required to state the facts of the case and then the accused is given an opportunity to respond to them – s/he can admit the facts, dispute them or add relevant facts. If the accused disputes the facts or provides an explanation which renders the plea equivocal, the court is to enter a plea of not guilty and proceed to trial. However, if the accused does not dispute the facts in any material way, the court enters a plea of guilty and convicts the accused, and thereafter the statement of facts and the response of the accused is recorded. The statement of facts is important because it enables the court to ascertain whether the plea is unequivocal meaning that the accused has no valid defence; and enables the court to assess the sentence.[479]

After an accused person has been charged, and at any time before the judgment, the accused person and the Prosecutor may enter into a plea agreement in which the prosecutor agrees to reduce, withdraw, or stay the charge; or promises not to proceed with other possible charges. As part of this agreement the accused person may be required to pay compensation or restitution to the victim. The amount of the compensation is arrived at following negotiation between the victim and the accused, which are subject to the approval of the prosecutor, in the interest of justice. Either party, prosecution or accused person/legal representative, may commence plea negotiation. The negotiation is generally between the prosecutor and the accused person though the victim may make representations to the Prosecutor on the content of the agreement. However, the judge does not participate in the negotiation and is merely notified of the parties' intent to negotiate an agreement.[480]

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[478] Kenyan Criminal Procedure Code, s 207. The accused can also plead that s/he has been previously convicted of the same offence and the same facts, or that s/he has received a presidential pardon.

[479] *Adan Inshair Hassan v Republic* (n 455) [1973] EALR 445 reproduced in 18 (1974) African Law Journal 224.

[480] Kenyan Criminal Procedure Code, s 137A-E and the Criminal Procedure (Plea Bargaining) Rules, 2018, s 8 - 12.

An agreement is made in a prescribed written form[481] and is reviewed by or explained to the accused in a language s/he fully understands after which it is signed by the accused and the prosecutor. The complainant may also sign the agreement if it contains a clause on compensation and restitution of the complainant. The agreement contains all the terms agreed on between the prosecutor and defence, the substantial facts of the matter as well as the admissions made by the accused. The agreement may also contain a specific sentence recommendation agreed on between the accused person and the prosecutor.[482]

The court takes certain safeguards to protect the rights of the accused. In this regard, before a court accepts and records a guilty plea, it informs the accused of his/her fair trial rights which include: the right to a full trial, the right to plead not guilty and persist in that plea, the right not to give self-incriminating evidence, the right to be presumed innocent, the right to remain silent, the right to be represented by a legal representative of the accused's choice, the right to examine or have examined by his/her legal representatives all the prosecution witnesses, as well as the right to present witnesses in his/her defence. The court also explains to the accused person that by pleading guilty s/he waives the right to trial as well as the right to appeal the conviction arising from the guilty plea. Furthermore, the court also explains to the accused the nature of the charge which the accused is pleading to as well as the risk incurred by entering a guilty plea. In this regard, the court explains the following to the accused: the maximum possible penalty as well as the minimum mandatory penalty; any forfeiture of property involved; compensation and restitution orders involved; and, that in case the accused is prosecuted for perjury arising from a false statement, the prosecutor has the right to use, against the accused, any statements given by the accused in the agreement.[483]

After informing the accused of his/her rights, and the risks associated with a guilty plea, the next step is for the court to satisfy itself that the plea is supported by sufficient factual basis and that the accused was legally competent, of sound mind and that s/he voluntarily entered the agreement. After the court is satisfied of all the above, it accepts

[481] A template of the agreements is annexed to the Criminal Procedure (Plea Bargaining) Rules, 2018.

[482] Kenyan Criminal Procedure Code, s 137A-E and the Criminal Procedure (Plea Bargaining) Rules, 2018, s 8 - 12.

[483] Kenyan Criminal Procedure Code, s 137 F-G.

the plea and enters the factual basis of the same into the record at which point the agreement is binding on both the accused and the prosecutor. The court then convicts the accused person and invites submissions on matters relating to sentencing. In making the sentencing decision, the court considers at what point in the proceedings the accused gave the indication to enter into a plea agreement, that is whether the accused gave an indication at the beginning or towards the end of the proceedings. More sentencing concessions go to accused persons who enter agreements at the early stages of the trial. The court also considers the circumstances surrounding the accused's indication to enter into a plea agreement, as well as restitution and compensation agreed to be paid by the accused person, among other factors.[484]

However, the court has the option of rejecting the plea agreement upon which, the court informs the parties of its decision to reject the agreement and the reasons for the rejection is entered on the record. The decision of the court rejecting a plea agreement is final and there can be no application for appeal or review by either party. Upon rejection by the court, the agreement becomes void and no other negotiation may take place in relation to the same facts. Subsequently, a plea of not guilty is entered on behalf of the accused and the proceedings leading to the agreement are inadmissible in a subsequent or future trial relating to the same facts.[485]

An accused person may withdraw the guilty plea made pursuant to a plea agreement, for any reason, before it is accepted by the court. Similarly, the accused person may also withdraw the guilty plea, and set aside the agreement if the sentence recommended by the prosecutor to the court is higher than that agreed on in the plea agreement. However, after the court accepts the plea agreement, the accused person may only withdraw the guilty plea before sentencing is passed and having convinced the court of a fair ground for withdrawal. The decision on conviction and sentencing is final and can only be appealed in terms of the extent and legality of the sentence. The court, that issued the conviction and passed the sentence, may set both decisions aside on grounds of fraud or misrepresentation by either party to the agreement.[486]

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[484] Kenyan Criminal Procedure Code, s 137 H-J

[485] Kenyan Criminal Procedure Code, s 137 H-J.

[486] Kenyan Criminal Procedure Code, s 137 K-L and the Criminal Procedure (Plea Bargaining) Rules, 2018, s 12.

4.3.2 South Africa

Like in Kenya, at the commencement of trial, the charge levied against the accused is presented to the accused whereupon the accused may plead guilty or not guilty.[487] However, before the accused pleads to the charge there may be negotiation between the prosecutor and the accused in which the accused may agree to plead guilty in exchange for a just sentence, a postponement of the sentence and/or compensation to be paid by the accused to the victim. While negotiating, the prosecutor may consult with the investigating officer and should have regard for the nature and circumstances of the offence, the personal circumstances of the accused, previous convictions if any, as well as the interests of the community affected by the offence. The prosecutor may also take into consideration the views of the complainant or his/her representative, where it is reasonable to do so, and this may include views on compensation or a specific benefit or rendering of a service in lieu of compensation.[488]

The agreement entered pursuant to this negotiation must be in writing, like in Kenya, and must indicate that the accused, before entering the agreement, understood his/her fair trial rights including the rights to be presumed innocent, to remain silent and not to be compelled to produce self-incriminating evidence. The agreement also includes the full terms of the agreement, the factual basis of the guilty plea as well as the sentence agreement and any admissions made by the accused. The agreement is signed by the accused and the prosecutor as well as the complainant, in the latter case, only where the agreement contains a clause relating to compensation of the victim. Like in Kenya, a plea agreement in South Africa is entered between the accused and the prosecutor and the judge does not take part in it.[489]

Before the accused enters a plea, the prosecutor informs the court that a plea agreement has been reached where upon the court seeks confirmation from the accused that an agreement has indeed been reached. The court has the power to

[487] There are other options that the accused may plead including that s/he has previously been convicted, acquitted, discharged or pardoned of the same offence. The accused may also plead that the court lacks jurisdiction or that the prosecution lacks title to prosecute the offence. See South African Criminal Procedure Act 1977 (as amended in 2001), s 106.

[488] South African Criminal Procedure Act 1977 (as amended in 2001), s 105 A (1).

[489] South African Criminal Procedure Act, s 105 A (1) and (2).

order that the accused and prosecutor modify the agreement to comply with certain formal requirements. If the court is satisfied with the agreement, it enters a guilty plea on behalf of the accused and orders that the content of the agreement be disclosed in court. After the agreement is disclosed in court, the court confirms with the accused whether he/she entered the agreement freely and voluntarily without being unduly influenced and whether the accused stands by the admissions in the agreement and the statement of facts. If the court is not convinced of the accused's guilt, or the accused has not admitted to an aspect of the charge, or the accused has a valid defence, or for any other reason the court considers that the guilty plea should not stand, the court may reject the guilty plea, enter a plea of not guilty so that the trial commences *de novo* before another presiding officer. However, if the court is satisfied that the accused has fully admitted the allegations in the charge and that s/he is guilty of the offence charged, the court enters a guilty plea, and proceeds to consider the sentencing agreement.[490]

If the court finds that the sentencing agreement is just, the court convicts the accused and imposes the sentence proposed in the agreement. However, if the court considers that the sentence agreement is unjust, it informs the parties of the sentence it considers just whereupon the parties have two options: the first is to comply with the charge agreement and reserve the right to lead evidence regarding sentencing. If the parties choose this option, the court convicts the accused person and imposes the sentence it considers just. The second option is for the parties to vacate the agreement, whereby the court enters a plea of not guilty and orders a new trial before another presiding officer. However, if a new trial is ordered, the agreement is voided and neither the negotiation preceding the agreement nor the agreement itself and the record thereof can be referred to as evidence. Besides, no further agreement can be entered into by the parties relating to the same facts, and the prosecutor may proceed against the accused on any charge.[491]

[490] South African Criminal Procedure Act, s 105 A (3) to (7).

[491] South African Criminal Procedure Act, s 105 A (8) to (10).

4.3.3 France

Offences in France are categorised according to their level of seriousness and the punishment ascribed to them: *contravention* (minor offences), *délit* (intermediate offences) and *crime* (serious offences);[492] which are all dealt with by different first instance courts, following different procedures. A *contravention* is tried at the police court, a *délit* in a correctional court while a *crime* is tried in an Assize Court. [493] Investigations are generally conducted by the prosecutor, who has the discretion to decide how to handle complaints and denunciations.[494] However, where the offence meets the criteria of a *crime,* the prosecutor is obligated to refer the matter to an investigating judge who conducts judicial investigations and who generally has broader investigative powers than the prosecutor. Similarly, if the matter concerns certain types of *délit* the prosecutor may refer the case to an investigating judge who would carry out the investigations for the purpose of trial in the Assize Court. The procedural rules applicable in an Assize Court are more stringent than in the two lower courts.[495]

There are two different practices in France which are equated to plea negotiation in common law countries. The first is known as *correctionnalisation*, and occurs when the prosecutor classifies as a *délit,* an offence which would ordinarily qualify to be a *crime*, and therefore prosecutes it in the Correctional Court instead of the Assize Court. However, *correctionnalisation* is not provided for in the French Code of Criminal Procedure and has for a long time been a controversial practice, with many commentators considering it illegal.[496] Nevertheless, *correctionnalisation* continues to be practiced in France and seems to be generally accepted by legal practitioners.

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[492] Some scholars use the terms misdemeanour and felony to refer to *délit* and *crime* respectively, however upon close examination these English phrases, as often used in common law jurisdictions, do not properly capture the scope of these categories of offences in France. Therefore, the French terms will be maintained throughout the chapter. See Edwin R Keedy, 'The Preliminary Investigation of Crime in France' (1940) 88 University of Pennsylvania Law Review and American Law Register 385, 389–392 (the author explains the categorization of offences in France).

[493] Keedy (n 492) 389–397 (the author explains the classification of the three types of offences and the composition, structure and jurisdiction of the courts they are tried in).

[494] French Code of Criminal Procedure 2006 s 40.

[495] Keedy (n 492) 422.

[496] Keedy (n 492) 422.

Correctionnalisation is often likened to charge bargaining in the common law systems. Indeed, is some similarity with charge bargaining in the sense that an accused person is charged with a lesser offence which attracts a lower sentence upon conviction, however, the similarity seems to end there. For starters, although charge bargaining is often done as part of an agreement between the prosecution and the accused person, like in Kenya and South Africa discussed above, *correctionnalisation* is a unilateral decision on the part of the prosecutor.[497] Here it is worth noting that a prosecutor in France, unlike in Kenya and South Africa, is a member of the judiciary who is "not entrusted with the task of securing convictions in all cases. Prosecutors' obligation is rather to determine a just solution to the case and present it to the judge".[498]

An accused person has the right to oppose the reduction of a charge to *délit* or *contravention* and therefore trial in a Correctional Court or Police Court instead of in the Assize Court. This objection could be founded on the fact that an Assize Court has a robust screening process before a case is admitted to it and provides for wider procedural rights and higher evidentiary standards for the accused as compared to a Correctional Court or Police Court.[499] However, the catch is that by opposing the *correctionnalisation*, the accused would be charged with a more serious offence and exposed to a harsher sentence upon conviction. Therefore, in practice most accused persons do not object to being charged with a less serious offence.[500]

Secondly, while a charge reduction in Kenya and South Africa is often accompanied by an admission of guilt by the accused person, this is not a requirement in France. Even if the accused admits guilt, the confession is merely considered as part of evidence to be considered by the judge alongside other evidence; it does not replace a trial, but usually shortens it. Additionally, unlike in Kenya or South Africa, an accused person can retract the confession at any time before or during the trial. However, this

[497] Although some scholars argue that there may be "less explicit exchanges". See for example Richard S Frase, 'Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find out, and Why Should We Care?' (1990) 78 California Law Review 539, 630.

[498] Ma (n 447) 31; Keedy (n 492) 424.

[499] Frase (n 497) 430.

[500] Ma (n 447) 32–33.

does not prevent the confession from being introduced at trial, the prosecutor merely needs to state that the confession was given and then retracted.[501]

The second French practice which is associated with plea negotiation is known as *comparution sur reconnaissance préalable de culpabilité* (CRPC), which translates to appearance after admission of guilt, and which was introduced in 2004.[502] This procedure is applicable to *délits* which are punishable by a fine or an imprisonment term of less than 5 years and may be commenced by the prosecutor or by the accused or the accused's counsel. It only occurs where the accused admits the offence charged. The prosecutor may suggest a penalty to be imposed on the accused and where the penalty involves a prison sentence, it should not be more than one year, and if a fine is imposed it cannot exceed the maximum fine applicable to the offence; both fine and imprisonment may be suspended. The prosecutor may also suggest that the penalty be imposed immediately or suspended in part or in whole.

The prosecutor makes these suggestions in the presence of an accused person's advocate. It is mandatory that the accused be represented by an advocate who is either chosen by the accused or appointed by the bar at his/her request; the accused is to bear the costs of the advocate unless the accused meets the criteria for legal aid. The accused person's advocate has immediate access to the entire case file which is different from the practice in Kenya and South Africa where the defence counsel does not have access to the entire prosecution file but only to portions of it disclosed by the prosecutor.[503] The accused has the right to communicate freely with his/her advocate in the absence of the prosecutor and may take up to ten days to consider the proposed sentence before communicating his acceptance or declination. However, if the accused chooses to have ten days of deliberation, he may be placed under judicial supervision or pre-trial detention for that duration. The decision of whether an accused should be placed in detention for the period of deliberation is determined by the liberty

[501] Ma (n 447) 33.

[502] See the French Code of Criminal Procedure, s 495-7 to 495-16.

[503] See the French Code of Criminal Procedure, s 495-8 as compared to the South African and Kenyan Criminal Procedure sections discussed in parts 4.3.1 and 4.3.2.

and custody judge (who is different from the judge who will preside over the accused's trial).[504]

The judge is not involved in the negotiation but rather in the approval of the agreements. If the accused person accepts the prosecutor's proposal, the issue is presented before the president of the district court or a judge appointed by him who considers the truth of the facts and their legal qualifications.[505] The judge issues a reasoned decision on the same day at a public hearing; and the prosecutor does not have to be present at this hearing. The judge, if s/he accepts the penalties proposed by the prosecutor, must state in the decision that the accused has accepted the offences charged in the presence of his/her counsel and that the penalty imposed is justified based on the offence charged and the character of the perpetrator. The judge's decision amounts to a conviction judgment and is immediately enforceable, however, it may be appealed in all cases by both the prosecutor and the defence.[506] This is different from the position in Kenya and in South Africa, where the conviction based on a valid plea agreement cannot be appealed.

The victim of the offence, if identified, does not take part in negotiation, however, s/he is informed of them and invited to appear before the judge at the same time as the accused person and his/her counsel, in order to be a civil party to the proceedings and have the opportunity to request for damages for harm endured. Even if the victim does not appear, the judge rules on the request for damages and the victim has a right to appeal against the decision of the judge in this regard. If the victim fails to exercise this right, s/he has the right to summon the perpetrator to a correctional court which court will rule only on the civil claim after consulting the case file.[507]

A report must be drawn indicating the formalities undertaken under the CRPC regime, otherwise the proceedings could be nullified. However, if the accused does not accept

[504] See the French Code of Criminal Procedure, s 495-8 and 495-10.

[505] If the accused person does not accept the proposal of the prosecutor, the prosecutor may seize the correctional court or order investigations into the matter.

[506] French Code of Criminal Procedure, s 495-9 and 495-11.

[507] French Code of Criminal Procedure, s 495-13.

the proposal of the prosecutor, the report or statements made, or documents produced during the negotiation cannot be used in further proceedings.[508]

Correctionnalisation and CRPC occur simultaneously in the French criminal justice system. The former is where a prosecutor, unilaterally requalifies a serious offence (a *crime* with a penalty of 10 plus years) in order to prosecute it in a Correctional Court instead of an Assize Court as the law mandates. There is no requirement for the accused to plead guilty and though the accused may oppose the process, they rarely do. While CRPC involves only minor offences (*délit* with a penalty of 5 years and below) and the prosecutor's decision is not unilateral rather the accused is required to plead guilty and must be assisted by counsel. In both processes the participation of victims is permitted.

4.3.4 Germany

Plea agreements in Germany involve the judge, the prosecution and the defence. Unlike in South Africa and in Kenya where the parties take the initiative to commence negotiation, in Germany the law requires the judge to make the first step and to propose an agreement to the prosecution and defence. The agreement can only relate to the legal consequences that will form part of the judgment, as well as procedural matters and the conduct of the parties during trial. A confession is an integral part of such an agreement, however like in France such confession does not lead to an automatic guilty verdict on the accused.[509] Instead, it forms part of the evidence and a judge has a further obligation to establish the truth by taking evidence from all facts and means of proof relevant to the case.[510]

In proposing the agreement, the court announces what it may contain and may indicate the upper and lower limits of the sentence based on the circumstances of the case and the sentencing guidelines. Thereafter the prosecution and the defence are afforded the opportunity to make submissions. An agreement is reached if the prosecution and

[508] French Code of Criminal Procedure, s 495-14.

[509] The German Code of Criminal Conduct (Strafprozessordnung) as amended on 23 April 2014, s 257 c (hereinafter referred to as StPO).

[510] StPO, s 244 (2).

accused person agree to the content of the agreement proposed by the judge.[511] The agreement is then entered into the court record and it reflects the essence, course of the negotiation, the content thereof as well as the outcome of the agreement.[512] The court has a wide discretion to set aside the agreement if it becomes apparent that the proposed sentence does not match the gravity of the offence or the guilt of the accused. Such a situation may arise if factually or legally important factors were overlooked during the agreement; if such factors arise after the agreement has been entered into; or, if the conduct of the defendant during trial does not correspond to that which the court's prediction was based. If the court decides that it is no longer bound by the agreement, it informs the parties promptly and the defendant's confession can no longer be used in the case. [513]

However, if the court sets aside the agreement, unlike in Kenya and South Africa, the accused person is not entitled to a trial before a different presiding officer and faces the same judges who were part of the botched negotiation and who are aware of the contents of the confession. This undermines the practical value of excluding the defendant's confession if the negotiation fail and leaves the defendant with "no more than a highly volatile sentence offer."[514] Perhaps for this reason, the statute provides that the defendant is to be informed of the circumstances which might cause the court to set aside the agreement and the consequences of that.[515] Some scholars opine that by including this provision, the legislature intended that the accused be made aware of the danger that could arise from issuing a confession.[516] Furthermore, the defence and the prosecution both have the right to appeal a judgment made following an agreement and such right to appeal cannot be waived in the agreement.[517]

A number of principles govern criminal procedure in Germany and at least three of these regulate plea agreements. The first is the doctrine of compulsory prosecution

[511] StPO, s 257 c (3).

[512] StPO, s 273 (1a).

[513] StPO, s 257 c (3).

[514] Thomas Weigend and Jenia Iontcheva Turner, 'The Constitutionality of Negotiated Criminal Judgments in Germany' (2014) 15 German Law Journal 81, 92.

[515] StPO, s 257 c (4).

[516] Weigend and Turner (n 514) 92.

[517] StPO, s 302.

which, as discussed below requires that all serious offences be prosecuted, with some expressly stated exceptions, therefore charge bargaining is forbidden. The second is that it is the role of the judge to investigate and arrive at the material truth. For this reason, judges are required not to convict based on an agreement or the confession of the accused but to find objective evidence to support the conviction. The third is the guilt principle according to which sentencing should be proportionate to the guilt of the accused and the gravity of the offence; and, it is for this reason that judges are required to give the general range of the sentence and not the specific sentence. [518]

However, there is a wide gap between the provisions of the law above, and plea negotiation as they occur in practice. In a survey conducted in 2012, it emerged that 59% of the surveyed judges conducted the agreements in a manner contrary to the statute and did not record the agreement as required by statute. Similarly, the research found that some judges failed to inform accused persons that the court may withdraw from the agreement and under what circumstances; that judges convicted the accused on the sole basis of their confession; there was evidence of charge bargaining; judges told defendants the specific sentence to be expected as opposed to the range; sentences were disproportionately low or high in relation to the guilt of the accused.[519] Furthermore, the prosecution and the defence are often involved in informal negotiation, without involving the court, as a result of which charges are dropped and less serious charges are proffered.[520]

4.4 Comparison between common law and civil law jurisdictions

This section includes the comparison of the criminal procedure and practice in Kenya, South Africa, France and Germany which affect plea negotiation in these countries in order to understand the commonalities and differences of plea negotiation in common law countries and civil law jurisdictions.

[518] Weigend and Turner (n 514) 85.

[519] Weigend and Turner (n 514) 92–93.

[520] McCleery (n 447) 1114.

4.4.1 Prosecutorial discretion versus compulsory prosecution

Prosecutorial discretion refers to a range of powers the prosecutor possesses including whether to charge a defendant with one offence or another, whether to proceed to trial, and whether to drop or amend charges. Since the prosecutor is an essential part of plea negotiation in all the four jurisdictions, the amount and extent of prosecutorial discretion determines whether plea negotiation can occur in a particular jurisdiction and, if it can, the type, or the extent of it. In some common law countries, the prosecution has a very wide discretion as shown below by the practice in Kenya and South Africa. However, in civil law countries the prosecutor has little to no discretion as in the case France discussed below, where the prosecution has limited discretion; while in Germany, the prosecutor has no discretion due to the concept of compulsory prosecution.

Kenya

In Kenya the Director of Public Prosecutions (DPP), the officer in charge of all criminal prosecutions, has the power to institute and undertake prosecutions against any person, take over prosecutions instituted by other persons or authority, as well as to discontinue at any time before judgment is delivered any proceedings instituted or taken over by the DPP.[521] The decision of the DPP to institute or withdraw proceedings should be based on whether there is sufficient evidence to prosecute and should consider issues such as the public interest, the interests of administration of justice and the need to prevent the abuse of the legal process.[522] The DPP cannot withdraw a case without the permission of the Court but if the case is withdrawn, the defendant is acquitted. In practice, Kenyan courts are reluctant to curtail the discretion of the DPP to institute or withdraw cases if he gives reasons for the decision and seems to act in good faith.[523]

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[521] The Constitution of Kenya 2010, art 157 (6); Office of the Director of Public Prosecutions Act 2013, s 5 (1) (b).

[522] The Constitution of Kenya 2010, art 157 (11).

[523] See for example *Communications Commission of Kenya v. Office of the Director of Public Prosecutions & another* [2018] eKLR (the Court of Appeal in this case confirmed the discretion of the DPP in deciding not to institute charges). See also *Seenoi Ene Parsimei Esho Sisina & 8 Others v. Attorney General* [2013] eKLR paras 24-34 (the Court held that the DPP could exercise the power to

South Africa

The position in South Africa is very similar to that in Kenya in that the prosecuting authority in South Africa, the National Prosecuting Authority (NPA), has the power to institute criminal proceedings on behalf of the state.[524] In instituting cases the NPA is guided by whether there is sufficient evidence and whether there is a reasonable prospect for a conviction. The NPA has the power to stop a prosecution if a plea has been taken; or, if due to other circumstances the prosecution becomes undesirable. In South Africa, unlike in Kenya, a court cannot prevent a prosecutor from withdrawing a case or accepting a plea.[525] If the NPA stops the prosecution, the defendant is acquitted and may not be charged again on the same facts, however under exceptional circumstances, the NPA may recommence prosecution.[526] The NPA is required to give reasons for its actions which may be challenged before the courts by affected persons or organisations.[527]

France

As discussed above, offences in France are categorised according to their level of seriousness and the sentence they attract: *contravention* (minor offences), *délit* (intermediate offences) and *crime* (serious offence). Investigations are generally conducted by the prosecutor, who has the discretion to decide how to handle complaints and denunciations.[528] However, where a *crime* is concerned the prosecutor is obligated to contact an investigative judge who then proceeds with judicial investigations and who generally has broader investigative powers than the

withdraw a case before judgment if he acted in good faith and took into consideration the interests of all concerned especially the victims).

[524] The Constitution of the Republic of South Africa 1996 s 179 (2).

[525] Esther Steyn, 'Plea-Bargaining in South Africa: Current Concerns and Future Prospects' (2007) 20 South African Journal of Criminal Justice 206, 206.

[526] 'Prosecution Policy (Final as Revised in June 2013. 27 Nov 2014)' pt 4 <https://www.npa.gov.za/content/prosecution-policy-and-policy-directives>.

[527] Pieter Du Toit and Gerrit Ferreira, 'Reasons for Prosecutorial Decisions' (2016) 18 Potchefstroom Electronic Law Journal 1506.

[528] French Code of Criminal Procedure 2006, s 40.

prosecutor. Similarly, if the matter concerns a *flagrant délit*,[529] the prosecutor may refer the case to an investigative judge who would carry out investigations.

The prosecutor has the power to decide whether to prosecute complaints received; although this discretion is limited by the right of the victims to institute proceedings in police court[530] or to directly request the investigative judge to commence investigations. Furthermore, victims have the right to appeal the investigative judge's/prosecution's decision not to investigate and/or prosecute, although this does not happen often in practice.[531]

Unlike in Kenya and South Africa, the French prosecutor does not have the formal power to drop a case once it has been filed in court or forwarded to the investigative judge. This power rests with the court/ the investigative judge to determine whether the crime fits the facts which are alleged by the prosecutor or revealed upon further investigation.[532] Therefore, a prosecutor in France has relatively lower power during plea negotiation because s/he has less leverage as once the case is filed, the prosecutor no longer has the power to suspend or terminate proceedings.

Germany

Like in Kenya, South Africa, and France, the public prosecution office in Germany has the power to institute charges. However, unlike in these jurisdictions, in Germany there exists a doctrine of compulsory prosecution whereby the prosecutor is obliged "to take action in relation to all prosecutable criminal offences, provided there are sufficient factual indications."[533] There are exceptions to this rule: the public prosecuting office may decline to prosecute where the offence is a misdemeanour and the perpetrator's guilt is of a minor nature.[534] The prosecutor's declination is subject to the approval of

[529] This concept is very specific to the French criminal justice. See the definition and scope of the phrase in Keedy (n 492) 391.

[530] Petty offences in France are handled in the police court.

[531] Frase (n 497) 613.

[532] Frase (n 497) 613.

[533] The German Code of Criminal Conduct (Strafprozessordnung) as amended on 23 April 2014, s 152 (hereinafter referred to as StPO).

[534] Herrmann (n 464) 757 (the author mentions that a misdemeanour can be set aside if the accused agrees to pay a sum of money to the state or to a non-governmental organization).

the court competent to open the main proceedings and can only be allowed where public interest is not concerned. However, this does not seem to limit the power of the prosecutor much because in practice, the court generally grants its approval.[535] The approval of the court may be dispensed with when the misdemeanour involved is not subject to an increased minimum penalty and where the effect of the misdemeanour is minimal.[536]

However, after a case has been brought before the court, the prosecutor has no power to discontinue prosecutions and the proceedings may only be terminated by the court, with the consent of the prosecution office and the accused person.[537] Therefore, the law requires that all felonies and misdemeanours which do not fall under the above exceptions be prosecuted if there is sufficient evidence.[538] Like in France, the victim of the crime may ask for the review of a prosecutor's decision not to prosecute, and if the decision is upheld, the victim has the right to appeal to the courts to compel prosecution.[539] Because of limited prosecutorial discretion, a prosecutor in Germany has less power during plea negotiation as will be discussed below.

4.4.2 Role of the prosecution, defence, judge and victims in plea negotiation

The prosecution

The role of the prosecution is the most closely related in the four jurisdictions: in Kenya, South Africa, France and Germany, the prosecutor conducts investigations and prosecutes cases therefore they have a role in plea negotiation. However, the powers they possess differ in that common law prosecutors generally have more powers in plea negotiation than in their civil law counterparts. As discussed above, the directors of public prosecutions in Kenya and South Africa have powers to choose which cases to prosecute, to choose what offences to charge the defendants with, as well as to stay or withdraw the cases at any time before judgment is entered. These prosecutors therefore have wide leverage during negotiation with defendants and defence counsel

[535] Herrmann (n 464) 759.s

[536] StPO, s 153 (1).

[537] StPO, s 153 (2).

[538] Langbein, 'Land without Plea Bargaining' (n 450) 211.

[539] Langbein, 'Land without Plea Bargaining' (n 450) 211.

which their civil law counterparts do not possess. These prosecutors may choose to charge the defendant with a lesser charge, drop some charges or not to charge at all. Furthermore, they could drop the case against the defendants, at any time before judgment is entered, in exchange for a guilty plea. These jurisdictions also allow the prosecutor and defence to negotiate a sentence and recommend it to the court. Though these sentences are by law not binding on the court, courts in Kenya and South Africa generally sentence within the range recommended. Therefore, prosecutors have wide, almost unfettered powers when they participate in plea negotiation.

Conversely, in civil law countries, like Germany and France, prosecutors' powers in relation to plea negotiation are limited. In both France and Germany, once trial begins the prosecutor no longer has powers to withdraw charges, which powers now rest with the court. Similarly, in both countries charge bargaining is curtailed, if at all permitted: in France, if the offence is classified as a *crime*, the prosecutor must refer the case to an investigating judge who takes over the investigations and the prosecutor no longer has power. The prosecutor's sole discretion, in this regard, therefore, is to classify an offence which would otherwise be a *crime* as a lesser offence, a *délit* or a *contravention,* so that the prosecutor retains the power to prosecute it in a lower court. Therefore, their leverage with the defendant is limited as they have less to offer compared to Kenyan and South African prosecutors.

German prosecutors are perhaps even more limited because the principle of compulsory prosecution requires that they prosecute all cases when there is sufficient evidence and therefore, at least in theory, they have very little wiggle room.[540] Besides, the law requires that negotiation be commenced by the judge who proposes an agreement to the prosecution and defence, therefore, leaving the prosecutor with even less leverage.[541] In fact, in Germany, as discussed above, sometimes negotiation may occur between the judge and the defence without involving the prosecutor, which would be unheard of in common law countries.

[540] As seen in part 4.3.4 above, however, there is discrepancy between the law and practice of plea negotiations in Germany.

[541] As seen in part 4.3.4 above, this is not always the case in practice as sometimes plea negotiations may be commenced by a prosecutor.

The defence

In all four jurisdictions, the accused person gives up fundamental rights in plea agreements, therefore, it is mandatory that the accused person and his/or her counsel, if they have one, participate in negotiating the agreement. In fact, in South Africa it is mandatory for an accused person to be represented by counsel otherwise the plea agreement entered will not be valid. Similarly, an agreement cannot be entered into without the accused person's voluntary consent. Indeed, in Kenya and South Africa, the defence is one of the two principal parties in plea agreements and the law permits the defence to commence plea negotiation. On the other hand, in France, an accused person has more of a negative right in that they can oppose the process of *correctionnalisation* where the prosecutor classifies a crime as a *délit* or *contravention* instead of a *crime*. In the case of CRPC, the accused is required to admit guilt and must be assisted by counsel. In Germany, the law provides that a judge shall propose an agreement to the prosecutor and defence and the agreement becomes valid when both the prosecutor and defence agree to it. It does not provide that the defence may commence negotiation, although in practice there is evidence that defence counsels commence negotiation, as mentioned above.

In all four countries, the accused person gives up the right to be presumed innocent and the right to not give self-incriminating evidence, however in Kenya and South Africa, this goes even further as the accused person gives up the right to trial and the right to appeal a conviction. In both countries, once the accused pleads guilty, he is convicted based on his guilty plea and then sentenced. The accused is not allowed to appeal the conviction arising from a guilty plea and can only appeal the sentence. However, in France and Germany the accused retains their right to a fair trial and a trial is conducted, albeit a short one. The criminal procedure in both countries require that the accused be convicted only based on the evidence collected by the judge and therefore an accused person's admission of guilt merely becomes part of the evidence at trial. Furthermore, the right to appeal is paramount and cannot be waived by a plea agreement, therefore even if an accused person confesses and is convicted at trial, s/he still has recourse to appeal the conviction.

The defence seems to have more leverage in the negotiation in France and Germany where the defence counsel has access to the evidence collected by the prosecutor and

the judge, therefore they negotiate from a point of knowledge. In both countries, all the relevant evidence collected by the judge and the prosecutor are put in a dossier to which both parties and the judge have access. This is unlike the defence in Kenya and South Africa who negotiate based on the prosecutor's assertions because they have no access to the entire prosecutor's files. Once the trial begins, the law provides for disclosure of information to the defence, but this only covers some documents and does not necessarily extend to the entirety of the evidence in the prosecutor's possession. Therefore, as compared to their civil law counter parts, the defence in Kenya and South Africa negotiate without ever fully knowing the extent of the evidence in the prosecutor's possession and this may lead to overcharging by the prosecutors in order to force the accused to plead guilty, a phenomenon which will be discussed below.

The other issue relates to the ability of the accused person to retract the confession or guilty plea. In this regard, the French and German accused persons have an advantage over the Kenyan and South African ones as the law permits them to withdraw their confessions at any time before judgment is entered. Although, as discussed above, the practicality of this right is limited by the fact that even if a confession is withdrawn, it is still introduced as evidence, accompanied by a statement to the effect that it was withdrawn. Another aspect which weakens the position of the accused in Germany, as discussed above, is that judges can set aside an agreement if it becomes apparent that important factual or legal factors were not considered, if such factors arise later or based on the behaviour of the accused during trial. After the agreement is set aside, the confession cannot be used as evidence, however, the accused stands trial before the same judges who were part of the negotiation.

On the other hand, plea agreements in Kenya and South Africa are more binding in that, once an agreement is entered between the prosecution and the defence and approved by the judge, and subsequently the accused has pleaded guilty, the accused person cannot withdraw the guilty plea unless he proves that there was misrepresentation on the part of the prosecutor. Furthermore, a judge can only set aside the agreement under certain strict criteria, for example, if it was not voluntary or unequivocal. If the agreement is set aside, in both South Africa and Kenya, the accused has a right to be tried before a different presiding officer, but the accused can waive this right.

Similarly, in Kenya and South Africa, the agreement entered into is formal and written in a specified form and it lays out the facts agreed upon, the sentence, as well as the rights forfeited by the accused; this agreement is signed by both the defence and the prosecutor and it becomes part of the case record. This protects the accused in that it is clear what the content of the agreement is and anything that does not form part of the written agreement cannot be relied upon to the accused person's detriment. On the other hand, France and Germany do not have written agreements. Practice reflects that a lot of informal negotiation occur between the parties, sometimes on the phone, and often there is no record of these anywhere. This puts the accused in a precarious position in that the terms of the agreement cannot be verified. In Germany, the law requires that the essence, content and consequence of an agreement be entered on the case record. However, as mentioned above, some judges surveyed admitted that they did not always follow this rule and that some agreements entered were not recorded.

The judge

The role of the judge in plea negotiation is one of the main distinguishing factors between civil law and common law countries. In Kenya and South Africa, the judge does not participate in negotiation but is involved in scrutinizing the agreement to confirm that all the formal and substantive requirements have been fulfilled and that the rights of the accused person have been respected. The judge receives a sentencing recommendation from the agreement entered into by the defence and the prosecution but is not bound by it. However, in Germany the judge is an active participant in negotiation. Indeed, according to the criminal procedure code, the judge proposes an agreement to the parties and can state the upper and the lower limit of the sentence. This rule is justified by the fact that judges in Germany not only have investigative powers but also have access to the complete prosecution file which means access to all the relevant information in a case, which is not the case for judges in Kenya and South Africa. A German judge therefore proposes an agreement from a position of full knowledge and does not need to scrutinise the agreement because s/he was party to it.

Victims

In all four jurisdictions, victims have a remote role in plea negotiation. In Kenya and in South Africa, the prosecutor when negotiating a plea agreement is to take into consideration the views of the victims unless the circumstances do not permit. Furthermore, in these two jurisdictions victims sign the plea agreement if it involves issues of compensation. This a weak standard of victim involvement as they are only involved at the discretion of the prosecutor who determines if the circumstances permit and the law does not provide for a means for the victims to appeal the decision of the prosecutor if it is against victims' interests.

On the other hand, victims have more rights in the procedural law, and as a result in plea negotiation, in civil law countries such as France and Germany. In France, for example, a victim has a right to appeal against the decision of a prosecutor to decline prosecution or to file a case with the investigating judge or at the Police Court directly, thereby bypassing the filtering mechanisms of the prosecutor. Similarly, in Germany, the victims of crime have a right to participate in proceedings as "supplementary prosecutors" which gives them rights similar to those of prosecutors during plea negotiation.[542]

4.4.4. The bargain with serious crimes

Some commentators have argued against the introduction of plea negotiation in international criminal tribunals (the ad hoc tribunals and the ICC) because, they argue that, the crimes involved are too grievous to permit negotiation with perpetrators.[543] The practice in national jurisdictions is varied in the sense that common law jurisdictions, as in the case of Kenya and South Africa discussed above, allow for plea bargaining for all crimes, including serious crimes. However, the Kenyan law makes an exception when it comes to sexual offences and international crimes (genocide, war crimes and crimes against humanity).[544] On the other hand, their civil law counterparts are more reluctant to allow for negotiations in relation to serious crimes. In France, for

[542] See StPO, s 395-402. See also Weigend and Turner (n 514) 99.

[543] See discussion in chapter 5.

[544] Kenyan Criminal Procedure Code, s 137 N.

example, CRPC is only allowed for offences which attract a maximum penalty of five years and excludes sexual offences.[545]

4.4.5 Sentence bargaining and charge bargaining

Plea negotiation may occur in at least two ways: charge bargaining and sentence bargaining. Charge bargaining involves the amendment of a charge to a less serious one, or the dismissal of certain charges or the dropping of charges all together in exchange for a guilty plea. Common law countries generally practice charge bargaining for example in Kenya and South Africa, the director of public prosecution has the power to commence prosecution, take over prosecution commenced by other entities, as well as, to stay or terminate prosecutions at any time before judgment is entered. In this regard, prosecutors can bargain to reduce charges, amend them and even drop them altogether at any time before judgment is entered.

The position in civil law countries is different, for example, the law in Germany does not allow for charge bargaining because of the principle of compulsory prosecution which mandates the prosecutor to prosecute all crimes if there is evidence. Prosecutors therefore lack the power, in law, to reduce charges in exchange for a confession, although the practice seems to be different as discussed above. Similarly, in France, charge bargaining is not provided for in the criminal code. However, in practice prosecutors perform *correctionnalisation* through which they change the characterization of an offence, which would ordinarily amount to a *crime,* thereby characterising it as a délit or a *contravention* and prosecuting it in a lower court. Commentators equate this practice to charge bargaining in common law countries. However, as discussed in part 4.3.3 above, there are differences between charge bargaining and *correctionnalisation.*

The second type of bargaining, sentence bargaining, occurs when the sentence resulting from a plea agreement is lower than that which would have been imposed after a regular trial. This practice occurs in both common law and civil law countries. For example, in South Africa, the accused person and the defence often agree on an accepted range of sentencing, which the court must accept if it accepts the plea agreement, otherwise the defendant is entitled to withdraw from the agreement.

[545] The French Code of Criminal Procedure, s 495-7.

Similarly, in France when a defendant pleads guilty under the CRPC regime, s/he is to be sentenced to a maximum of one-year imprisonment. Likewise, in Germany, the judge is permitted to indicate to the defendant the range of sentence that would be imposed by the court if the defendant admits guilt. However, unlike in common law countries, the court is not strictly bound to this indication even if it accepts the plea agreement and might deviate from it if it becomes apparent that the proposed sentence does not fit the crime.

4.5 Critique of plea negotiation

Plea negotiation is a controversial practice – many commentators find the practice to be repugnant to justice. In fact, any sort of bargain in the arena of crime and punishment often excites criticism[546] – and justifiably so, since the idea of bargaining with justice is unsettling. Similarly, since agreements are negotiated in private, there is lack of transparency which is often associated with a trial in open court through which guilt is publicly established. This therefore leads to public mistrust because the public sees the result (the plea agreement and/or conviction) but not the process through which it was arrived at. For example, in its infancy, plea bargaining in the US was shrouded in secrecy and accompanied by corruption among those involved in the bargaining process including police officers, prosecutors and politicians.[547] The general mistrust against plea bargaining is therefore justified.

This section deals with the issues arising from the process of plea negotiation itself rather than the philosophical or policy issues around the idea of it. In this regard, since the practice in common law jurisdictions varies from their civil law counterparts, this section examines issues which are common to both forms of jurisdictions.

[546] Other practices involving some sort of bargain in criminal practice have been heavily criticised as well. For example, the practice of compounding where the defendant would pay money to the victim to avoid prosecution or the practice of approvement where the accused confessed his crime and provided information to be used in the prosecution of his/her accomplices, in exchange for pardon. Both practices were heavily criticized during their existence and were therefore abolished. See Alschuler, 'Plea Bargaining and Its History' (n 435) 14.

[547] Alschuler, 'Plea Bargaining and Its History' (n 435) 26.

4.5.1 Judicial economy and efficiency

The main argument for plea bargaining is that it saves judicial time and resources and increases the efficiency of case disposal.[548] Full trials are costly, and sometimes lengthy because of complex procedural rules or evidentiary challenges and therefore plea negotiation, which lead to convictions in common law countries and shorter trials in civil law countries, serve to shorten the proceedings and save costs. It can also help in reducing the caseload in courts and clearing backlogs.

Additionally, sometimes when defendants plead guilty, they cooperate with the prosecutors by providing useful evidence which may be used in other cases and this is important especially with regard to organised crime. [549] In the same vein, since trials are very uncertain, some see plea negotiation as a chance of ensuring conviction and thereby increasing certainty in trials. This is beneficial to the prosecutor who is assured of a conviction and can therefore concentrate on more meritorious cases, thereby increasing the quality of prosecution. Similarly, an accused person, even when unjustly accused,[550] would be willing to take a certain, but lower sentence, resulting from plea negotiation instead of risking a higher sentence upon conviction at trial.[551] There is consensus that plea negotiation ensures judicial economy and efficiency; the contention, however, is whether this benefit accrues at the expense of the administration of justice, and this is discussed below.[552]

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[548] Nuno Garoupa and Frank H Stephen, 'Why Plea-Bargaining Fails to Achieve Results in So Many Criminal Justice Systems: A New Framework for Assessment' (2008) 15 Maastricht Journal of European and Comparative Law 323, 326.

[549] Strang (n 444) 30.

[550] See Albert W Alschuler, 'The Prosecutor's Role in Plea Bargaining' (1968) 36 The University of Chicago Law Review 50, 61 (the author illustrates this point by discussing the account of a defence counsel whose client, though innocent, chose to plead guilty to a lesser offence rather than take the risk of conviction of a more serious offence at trial).

[551] Frank H Easterbrook, 'Plea Bargaining as Compromise' (1992) 101 The Yale Law Journal 1969, 1969.

[552] Michael Scharf, 'Trading Justice for Efficiency - Plea-Bargaining and International Tribunals' (2004) 2 Journal of International Criminal Justice 1070.

4.5.2 Rights of the defendant

One of the objections against plea negotiation at the national level is the idea that the state is bargaining or making deals with criminals and that criminals are getting less than they deserve; but this is not always true.[553] In fact, by entering into a plea agreement, a defendant gives up fundamental procedural and substantive rights. This is especially true in common law countries, like Kenya and South Africa, as discussed above. The rights waived by the accused in these countries include: the right to a full trial, the right to plead not guilty and persist in that plea, the right not to give self-incriminating evidence, the right to be presumed innocent, the right to remain silent, the right to examine or have examined by his/her legal representatives all the prosecution witnesses; the right to present witnesses in his/her defence; as well as the right to appeal conviction arising from the guilty plea.

The rights waived by the accused persons in civil law countries, like France and Germany, are lower since the law mandates, although things seem different in practice,[554] that an accused person cannot be convicted based solely on the admission of guilt, but rather based on the truth as unveiled by the court. Therefore, the defendants still undergo trial, albeit a short one, and they retain the right to appeal both the conviction and the sentence which cannot be waived in the plea agreement. Nevertheless, the defendants still give up fundamental procedural rights even in civil law countries as described in part 4.3 above.

In the same vein, there is concern that plea negotiation puts pressure on innocent defendants to either plead guilty or risk more severe punishment for exercising their right to trial.[555] One scholar, Langbein, equated plea bargaining in the US to torture in mediaeval Europe. In this regard, he argues that:

> "We coerce the accused against whom we find probable cause to confess his guilt. To be sure, our means are much politer; we use no rack, no thumbscrew, no Spanish boot to mash his legs. But like the Europeans of distant centuries who did employ those machines, we make it terribly costly for an accused to

[553] Bekker (n 434) 173.

[554] See discussion in part 4.3.4 above.

[555] Alschuler, 'The Prosecutor's Role in Plea Bargaining' (n 550) 60.

> claim his right to the constitutional safeguard of trial. We threaten him with a materially increased sanction if he avails himself of his right and is thereafter convicted. This sentencing differential is what makes plea bargaining coercive."[556]

This coercion goes to subvert the accused's rights to trial guaranteed by the laws of most countries and universal human rights principles.

Commentators suggest at least two remedies: first, some argue for an increase in statutory regulation of plea negotiation to protect the rights of the defendants. However, some practitioners express concern that regulation may interfere with the discretion of those negotiating and prevent them from obtaining the best possible outcomes during the negotiation.[557] Arguments have also been made to increase judicial oversight during plea negotiation, especially in common law countries, since this is already a feature of plea negotiation in civil law countries. In this regard, one scholar states that "though judicial involvement is not likely to eliminate all risks of plea bargaining, it is likely to minimize some of the gravest dangers of the practice: that a plea bargain does not reflect the true facts of the case, is unfair to the defendant, or is inconsistent with the public interest."[558]

Another issue which relates to the rights of the defendant concerns the equality of arms between the prosecution and the defence. In most jurisdictions, the prosecution has the backing and the resources of the state, whereas the defendant is a private person with relatively limited resources. Therefore, in many instances, unless the defendant is rich and can afford an army of lawyers, the negotiation occurs between parties who are unequal. Things seem different in civil law countries, like Germany and France, where the defence counsel has access to the entire prosecution file and knows exactly what evidence is in the dossier and therefore bargains from a point of knowledge unlike

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[556] John H Langbein, 'Torture and Plea Bargaining' The University of Chicago Law Review 20, 12.

[557] Brook and others (n 436) 1196.

[558] Jenia Iontcheva Turner, 'Judicial Participation in Plea Negotiations: A Comparative View' (2006) 54 The American Journal of Comparative Law 199, 202. See also generally McCleery (n 447) (the author discusses the lessons which the ICTY, whose procedural law is predominantly modelled after the common law system, may learn from the practices in civil law countries).

defence counsel in common law jurisdictions. [559] Similarly, during CRPC procedure in France, it is mandatory that an accused be represented by a lawyer either at the accused expense or at the states expense if the accused is indigent; thereby ensuring a higher protection of the defendant's rights.

4.5.3 Impact on victims

There are at least two contrasting views about the impact of plea negotiation on victims of crime. The first is that if plea negotiation leads to an accused person admitting guilt it saves the victims the need to testify and to face their abusers in open court thereby preventing the re-traumatization of victims, especially victims of violent crimes.[560] However, the other perspective is that victims are denied the opportunity to tell their stories which could be therapeutic in certain instances. Some jurisdictions mitigate this by allowing victims to participate in plea negotiation, for example, in Germany and France victims can apply to become civil parties to a criminal trial, while in Kenya and South Africa the victims sign, and therefore are party to the plea agreement, if it includes a clause on compensation of the victim.

4.5.4 Other penological purposes

In most instances, plea negotiation involves the accused person's admission of guilt and acceptance of responsibility for the crime committed. This could commence the process of rehabilitation of the victim and reintegration into the society.[561] The judges at the ICTY and ICTR stressed this aspect of plea bargain as a factor which can contribute to reconciliation in the post-conflict area, as discussed in the next chapter.

4.6 Conclusion

This chapter discussed the plea negotiation in national jurisdictions focusing on common law and civil law jurisdictions. The legal culture and procedural law in these countries are different but the idea of negotiated criminal justice continues to grow in both legal traditions albeit practiced differently. This chapter examined the practice in

[559] Herrmann (n 464) 764.

[560] Strang (n 444) 30.

[561] Strang (n 444) 30.

Kenya, South Africa, France and Germany since they are representative of common law and civil law legal cultures; and they are all states parties to the Rome Statute therefore representative of the legal practice at the ICC. The chapter outlined the definition and scope of plea negotiation as well as its development and the justification. It also explored the salient features of plea negotiation in Kenya, South Africa, France and Germany and on that basis compared and contrasted plea negotiation in common law and civil law countries. Finally, the chapter discussed the main arguments for and against plea negotiation in national jurisdictions. The next chapter will explore plea negotiation at the ICTR and ICTY along the same lines.

CHAPTER 5: PLEA NEGOTIATION AT THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA

5.1 Introduction

The previous chapter, Chapter 4, contained a comparative analysis of the practice of plea negotiation in Kenya, South Africa, France and Germany. The aim of this study was to understand how plea negotiation is practiced in common law jurisdictions, exemplified by Kenya and South Africa, on the one hand; and plea negotiation as practiced in civil law jurisdictions exemplified by France and Germany, on the other hand. Since the procedural law of the ICC draws from both common law and civil law practices, it is envisioned that such a study will help in understanding how plea negotiation would be practiced at the ICC, if at all. In the same vein, this chapter focuses on plea negotiation in the ICC's *ad hoc* predecessors, namely the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The chapter focuses on the justification for the introduction of plea negotiation in these tribunals, the application thereof, the challenges faced, and the lessons learnt. This discussion is with a view to understanding how plea negotiation was practiced at the *ad hoc* tribunals and what lessons, if any, the ICC may draw from it.

To aid in this discussion it is important to define two terms which will be utilised in this chapter and in the remainder of the thesis and these are: "confession" and "guilty plea". A confession may be given by an accused person concerning any aspect of the crimes charged, and at any time during the proceedings. It is considered as evidence to be considered in addition to other evidence produced at trial. On the other hand, plea taking is a procedural step done at the commencement of trial where the court informs an accused person of the charges levelled against them and they are provided with an opportunity to take a plea. If they plead guilty, and after the court ensures that certain procedural safeguards have been adhered to, a court generally proceeds to convict the accused person on the basis of the guilty plea. Guilty pleas and confessions are linked to plea negotiation in the sense that an agreement entered between the prosecutor and the defence, as a result of negotiation, may lead to the accused person issuing a confession or entering a guilty plea in exchange for charging or sentencing concessions offered by the prosecutor.

This chapter is organized as follows: the current section, part one, deals with the introduction. Part two discusses the organization and procedural law at the *ad hoc* tribunals. Where appropriate, the similarities and/or differences with the procedural law at the ICC will be pointed out. The objective of this discussion is to establish, at the end of the dissertation, how the structure and procedural law of the *ad hoc* tribunals compares to that of the ICC; and, whether plea negotiation would be compatible with the structure and procedural law at the ICC. Part three deals with the introduction of plea negotiation at the *ad hoc* tribunals. In this regard, it discusses the functional need for the adoption of plea negotiation at the *ad hoc* tribunals and the circumstances which led to such introduction. By way of illustration, it discusses two cases, the *Prosecutor v Drazen Erdemović* from the ICTY; and the *Prosecutor v Jean Kambanda* from the ICTR, which were the first cases involving guilty pleas at the respective tribunals.

Part four illustrates, with reference to the jurisprudence from the ICTY and the ICTR, the emergence of a streamlined practice of plea negotiation at both tribunals. In this regard, the essential elements of a valid guilty plea are discussed, and these are: whether the plea is voluntary, informed; and, unequivocal and whether is accompanied by a sufficient factual basis. Part four also discusses the interpretation of these elements and the standard applied by the various Trial Chambers to satisfy themselves that a plea was valid. Lastly, this part discusses to what extent a guilty plea was considered as a mitigating factor in sentencing.

Part five critiques the practice of plea negotiation at the *ad hoc* tribunals. The judges at both Tribunals stated that a guilty plea was beneficial because it saves judicial resources, and leads to the establishment of historical truth, and fosters reconciliation. This part examines whether guilty pleas, procured as a result of plea negotiation, indeed serves these purposes. Finally, part 6 concludes the chapter.

5.2 Organization and procedural law of the *ad hoc* tribunals

5.2.1 Establishment and composition

The ICTY was established by the United Nations Security Council (UNSC) under Chapter VII of the UN Charter to prosecute the persons responsible for the violations

of international humanitarian law in the territory of the former Yugoslavia from 1991.[562] The conflict in the former Yugoslavia was a result of succession wars within and among the six states[563] and two autonomous provinces[564] which formed part of the former Yugoslavia. Over 100,000 people were killed, over 2 million were displaced, and thousands of women, girls, men, and boys were raped during the conflict.[565] The ICTY had jurisdiction over grave breaches of the Geneva Conventions of 1949, violations of laws or customs of war, other war crimes, genocide, and crimes against humanity committed during this war.[566]

The ICTR was also established under Chapter VII of the UN Charter to prosecute persons most responsible for genocide and other violations of international humanitarian law, in Rwanda, and Rwandan citizens responsible for similar violations in neighbouring states, between 1 January 1994 and 31 December 1994.[567] During that period there was an ethnic conflict between the two major ethnic groups in Rwanda, Hutus and Tutsis, leading to the death of about 1 million people, mostly Tutsis, in about 100 days.[568] The ICTR had jurisdiction over genocide, crimes against humanity and violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II committed during the conflict in Rwanda.[569]

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[562] UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993, preamble.

[563] Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia.

[564] Kosovo and Vojvodina.

[565] 'The Conflicts | International Criminal Tribunal for the Former Yugoslavia' <http://www.icty.org/en/about/what-former-yugoslavia/conflicts> accessed 18 July 2018.

[566] ICTY Statute arts 2,3,4, and 5.

[567] UN Security Council, Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), 8 November 1994, preamble.

[568] The number of people who died in the Rwandan genocide is a controversial issue with different sources stating significantly different estimates. For example, according to the government of Rwanda about 1,070,014 Tutsi were killed in about 100 days. See 'Background' (*National Commission for the Fight against Genocide*) <http://cnlg.gov.rw/genocide/background/#.WOqNvaJBrIU> accessed 18 July 2018. While the Commission of Experts established by the UNSC in 1994 states that an estimated number of 500,000 people died during the conflict but acknowledges this to be a conservative figure. See 'Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994) Annex to UN Doc S/1994/1405 (9 December 1994)'.

[569] ICTR Statute, art 2,3 and 4.

Both the ICTR and the ICTY consisted of Chambers, comprised of Trial Chamber and Appeals Chamber; the latter which was shared between the two institutions.[570] It is noteworthy that unlike the ICC, neither the ICTY nor the ICTR had Pre-Trial Chambers.[571] Therefore, pre-trial proceedings were conducted by the Trial Chamber or by a pre-trial judge appointed from the Trial Chamber as discussed below.[572] The ICTY and the ICTR judges were appointed by the United Nations General Assembly (UNGA) from a list provided by the UNSC. [573] The ICTY judges had the power to adopt the rules of procedure and evidence, which were applicable to the ICTY, and to the ICTR with relevant changes adopted by the ICTR judges.[574] This is different from the ICC system where the rules of procedure and evidence are adopted by the Assembly of States Parties (ASP) as discussed in Chapter 2.

The *ad hoc* Tribunals each had a Prosecutor, and a Registry – the latter servicing both the Chamber and the Prosecution.[575] In the beginning, the ICTY and ICTR shared the Office of the Prosecutor, however, this was changed in 2003 when the UNSC amended Article 15 of the ICTR Statute to allow for the appointment of a Prosecutor of the ICTR, separate from that of the ICTY.[576] The Registrars and the Prosecutors of both institutions were appointed by the UN Secretary General.[577]

Both the ICTY and ICTR have since closed: the ICTR on 31 December 2015 and the ICTY on 31 December 2017. The United Nations Mechanism for International Criminal

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[570] ICTR Statute, art 13.

[571] The Pre-Trial Chamber at the ICC is an innovation introduced by the drafters of the Rome Statute to ensure judicial supervision of the prosecutorial powers and duties among other functions. See part 2.3.2 of this dissertation.

[572] ICTY RPE Rule 65 *ter* (A).

[573] ICTY Statute , arts 13 *bis* and 13 *ter* and ICTR Statute arts 12 *bis* and 12 *ter.* The UNSC chose from a list of nominees presented by UN States parties and non-member States maintaining permanent observer missions at United Nations Headquarters. The process of election of judges is marred by politics, just like the ICC. See generally Mackenzie and others (n 142).

[574] ICTR Statute art 14 and ICTY Statute art 15. The rules of procedure adopted by the judges in this regard were: ICTY RPE; International Criminal Tribunal for Rwanda, Rules of Procedure and evidence (as amended on 13 May 2015), Adopted on n 29 June 1995.

[575] ICTY Statute, art 11 and ICTR Statute art 10.

[576] see 'UNSC Resolution 1503 (28 August 2003) UN Doc S/RES/1503'.

[577] ICTY Statute, art 17 and ICTR Statute art 16.

Tribunals (MICT), established by the UNSC on 22 December 2010 currently carries out the residual functions of both the ICTY and the ICTR.[578] These functions include finding and trying of fugitives, hearing of appeals, supervising sentence enforcement, continued protection of witnesses and taking care of the *ad hoc* tribunal archives. The MICT commenced operations on 1 July 2012 in Arusha, United Republic of Tanzania, and on 1 July 2013 in The Hague, the Netherlands, inheriting the functions of the ICTR and ICTY, respectively.[579]

5.2.2 Procedural law at the *ad hoc* tribunals

Investigation and indictment

The ICTY and the ICTR had identical procedural law in terms of investigation and indictment. The Prosecutor had the power to initiate investigations *ex officio* or based on information received from the United Nations, Governments, and intergovernmental and non-governmental organizations.[580] The Prosecutor then had the power to question suspects and witnesses, collect evidence and conduct on-site investigations.[581] The suspect, if questioned, had the right to counsel or the right to legal assistance without payment in case they could not afford counsel. The suspect also had a right to translation into a language s/he fully understands and speaks. The Prosecutor would issue an indictment, if satisfied that a *prima facie* case exists, and the indictment would contain a concise statement of the facts and crimes with which the accused is charged.[582]

Pre-trial Proceedings

A judge of the Trial Chamber would review the indictment and confirm it if satisfied that a *prima facie* case had been established, otherwise the indictment would be dismissed.

[578] 'About the MICT' (n 78).

[579] 'About the MICT' (n 78).

[580] ICTY Statute art 18 and ICTR Statute art 17.

[581] International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and evidence (as amended on 8 July 2015), 11 February 1994, Rule 39.

[582] ICTY Statute art 18 and ICTR Statute art 17.

After confirmation, the judge, upon the request of the Prosecutor, had the power to issue orders such as warrants of arrest or summons to appear.[583]

As mentioned above, the *ad hoc* tribunals, unlike the ICC did not have a pre-trial chamber and therefore pre-trial proceedings were conducted by the Trial Chamber or by a pre-trial judge appointed from the Trial Chamber.[584] At this stage, the Trial Chamber or the single judge appointed for this purpose read the indictment, ensured that the rights of the accused are respected, confirmed that s/he understood the charge and instructed the accused to enter a plea.[585] If the accused entered a plea of not guilty a trial date would be set by the Registrar. However, if the accused person pleaded guilty, the Trial Chamber would ensure that the guilty plea was unequivocal, voluntary, and informed; and that there was sufficient factual basis of the crime and the accused's participation in it.[586] Once satisfied of these factors the Trial Chamber would enter a plea of guilty and order the Registrar to set a date for sentencing hearing.[587]

Both the ICTY and ICTR RPE provided for a plea agreement concluded between the prosecution and the defence.[588] As discussed below, plea agreements were not provided for in the initial versions of the ICTY and ICTR RPE adopted in February 1994 and June 1995, respectively, and were continuously amended as from 1997, when the need arose.[589] According to the amended provisions, if an accused person entered a guilty plea, based on a plea agreement, the Prosecutor may agree to: apply to the Trial Chamber to amend the indictment; submit to the Trial Chamber that a sentence or a sentencing range is appropriate; and/or not oppose the submission of the accused for a particular sentence or a sentencing range.[590] However, such agreements were not binding on the Trial Chamber. If an agreement was reached, it would as a rule be

[583] ICTY Statute art 19 and ICTR Statute art 18.

[584] ICTY RPE Rule 65 *ter* (A).

[585] ICTY Statute art 20 and ICTR Statute art 19.

[586] ICTY RPE Rule 62 *bis*; ICTR RPE Rule 62.

[587] ICTY RPE Rule 62 *bis*; ICTR RPE Rule 62.

[588] ICTY RPE Rule 62 *bis* and 62 *ter*; ICTR RPE Rules 62 and 62 *bis.*

[589] See part 4.4 below.

[590] ICTY RPE Rule 62 *ter* (A); ICTR RPE Rule 62 *bis* (A).

disclosed in open Court at the time the accused entered the guilty plea, however, this was sometimes carried out in closed session if good cause was shown.[591]

This process of dealing with guilty pleas provided for in the Statutes and RPEs of the *ad hoc* tribunals was drawn from the practice in common law countries, where a guilty plea, if considered valid by the judges, generally results in conviction.[592] By contrast, generally in civil law countries, an accused person's confession of guilt merely forms part of evidence to be examined by the judge in making the decision.[593]

Trial

Trial began by optional opening statements – the defence had the option to defer its opening statements until after the presentation of the Prosecutor's case but before the commencement of the defence case.[594] If the defence opted to defer its opening statement, the accused would sometimes be authorised by the Trial Chamber to issue a statement at the beginning of the trial.[595] Trial at the *ad hoc* tribunals leaned more towards adversarial system prevalent in common law jurisdictions since, for example, the investigation and indictment was conducted by the Prosecutor, as opposed to the judge.[596] This is further demonstrated by the sequence of the presentation of evidence which commenced by the Prosecutor, then defence, then prosecution evidence in rebuttal, then defence evidence in rejoinder. Subsequently, any further evidence ordered by the Trial Chamber would be presented as well as any relevant information necessary to aid the Chamber in entering an appropriate sentence upon conviction. [597]

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[591] ICTY RPE Rule *ter* (C); ICTR RPE Rule 62 *bis* (C).

[592] See for example the opinion expressed by judge Cassese in *The Prosecutor v. Drazen Erdemović* (Appeal Judgment Separate and Dissenting Opinion of Judge Cassese) IT-96-22-T (7 October 1997) [7]. See also discussion in Chapter 4.

[593] *Erdemović* (Dissenting Opinion of Judge Cassese) (n 592) para 7. See also discussion in Chapter 4.

[594] ICTY RPE Rule 84; ICTR RPE Rule 84.

[595] ICTY RPE Rule 84 *bis*. This provision is unique to the ICTY RPE; therefore, an equivalent does not exist in the ICTR RPE.

[596] Steven R Ratner and Jason S Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford University Press 2001) 169.

[597] ICTY RPE Rule 85 (A); ICTR RPE Rule 85 (A).

It is worth noting the difference with the procedural law of the ICC, in that the ICC RPE provides that the prosecution and the defence are to agree on the order and manner in which evidence is to be presented to the Trial Chamber.[598] If they fail to agree, the Trial Chamber is to issue directions on the conduct of proceedings. In theory, therefore, a trial at the ICC, unlike at the *ad hoc* tribunals, could begin with the presentation of evidence by the defence, if the parties agree to it. In practice however, Trial Chambers in each case at the ICC usually issue directions on the conduct of proceedings according to which trials begin with the presentation of evidence by the Prosecutor, followed by the victims' representative, then the defence, then the prosecution rebuttal, then defence rejoinder, more like at the *ad hoc* tribunals.[599]

During the presentation of evidence at the *ad hoc* tribunals, both parties were permitted to conduct the examination-in-chief and cross-examination of witnesses and the judge was authorized to ask additional questions.[600] After the presentation of evidence both the Prosecutor and Defence would make closing arguments where they would address sentencing matters, among other things.[601] It is noteworthy that typically common law terms such as 'examination-in-chief' and 'cross-examination' were employed in the ICTY and ICTR RPE to refer to the questioning of witnesses. By contrast the ICC, which has a relatively more hybrid procedural law, avoids such terms, instead referring to the process simply as questioning witnesses.[602] In practice Trial Chambers at the ICC sometimes distinguish between the party questioning the witness using descriptive words such as questioning by the calling party and questioning by the non-calling party, respectively.[603]

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[598] ICC RPE Rule 140 (1).

[599] See for example *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé* (Annex A to Decision adopting amended and supplemented directions on the conduct of the proceedings) ICC-02/11-01/15-498-AnxA (4 May 2016) [1]. See also *The Prosecutor v Jean-Pierre Bemba Gombo* (Directions on the conduct of the proceedings) ICC-01/05-01/08-1023 (19 November 2010) [5].

[600] ICTY RPE Rule 85 (B).

[601] ICTY RPE Rule 86.

[602] See for example ICC RPE Rule 140 (2) and Regulations of the Court, Regulation 43.

[603] See for example *Gbagbo and Blé Goudé* (Amended directions on the conduct of proceedings) (n 599).

Judgment and Sentencing

After the presentation of evidence by both parties, the presiding judge of the *ad hoc* tribunals declared the trial closed and deliberations occurred in private. The judges entered a conviction if, by majority, they found that the charges against the accused had been proven beyond reasonable doubt.[604] Sentencing at the *ad hoc* tribunals was limited to imprisonment, the most severe sentence being imprisonment for the remainder of the convicted person's life.[605] The length of imprisonment was determined considering a number of factors namely: the general practice regarding sentencing in the Former Yugoslavia and Rwanda, respectively; the gravity of the offence; the extent to which a sentence imposed by a national court of any state, on the same person for the same act, has already been served; as well as mitigating factors. [606] In mitigation, the RPE of the *ad hoc* Tribunals expressly required Trial Chamber to consider cooperation of the accused with the prosecution before or after conviction.[607] The judges considered these, as well as other factors including a guilty plea, remorse, duress, mental capacity during commission of crime and personal circumstances of the accused such as age, as discussed below.[608]

In addition to imprisonment, the convicted person could also be ordered to return property acquired through criminal activity to the rightful owners.[609]

Appeal

As mentioned above, the ICTR and the ICTY shared an Appeals Chamber. In both Tribunals, the defence and prosecution had the right to appeal against both a conviction and an acquittal based on an error of law invalidating the decision or an error of fact occasioning miscarriage of justice. The Appeal's Chamber could affirm, reverse or revise a decision of the Trial Chamber.[610] In a few exceptional cases, the Appeals Chamber would remit the case to a different Trial Chamber for reconsideration

[604] ICTY RPE Rule 87 (A) and ICTR RPE Rule 87 (A).

[605] ICTY RPE Rule 101 (A) and ICTR RPE Rule 101 (A).

[606] ICTY Statute art 24 and ICTR Statute art 23; ICTY RPE Rule 101 and ICTR RPE Rule 101.

[607] ICTY RPE Rule 101 (B) (2) and ICTR RPE Rule 101 (B) (2).

[608] See discussion in part 5.4.3 of this dissertation.

[609] ICTY Statute art 24 (3) and ICTR Statute art 23 (3).

[610] ICTY Statute art 25 and ICTR Statute art 24.

as occurred, for example, at the ICTY in the *Prosecutor v Drazen Erdemović* discussed below.[611]

5.3 The introduction of plea negotiation at the *ad hoc* tribunals

The introduction of plea negotiation at the *ad hoc* Tribunals was a highly contested issue. Both the ICTY and the ICTR Statutes as well as their RPE, as initially adopted, deliberately avoided making provisions for plea negotiation.[612] In 1994, during the adoption of the ICTY RPE, on which the ICTR RPE is based, representatives of the United States of America proposed the inclusion of a provision providing for partial or complete immunity for accused persons in exchange for their cooperation. This suggestion was rejected. Judge Antonio Cassese, the then President of the ICTY, stated that the ICTY had the task of prosecuting persons suspected of the most serious international crimes, and such persons should not be immune from prosecution no matter how helpful their testimony was.[613]

As a result, initially there was no framework to govern guilty pleas and plea agreements in either tribunal. When two accused persons, Drazen Erdemović at the ICTY and Jean Kambanda at the ICTR, pleaded guilty in 1996 and 1998 respectively, their guilty pleas were dealt with in an inconsistent manner, as discussed below. In 1999, the ICTY RPE was amended, a process which was informed by the guidelines, discussed in detail below, set by the Appeals Chamber in *Erdemovic* regarding the validity of guilty pleas.[614] Later in 2001, when the *ad hoc* tribunals, prompted by reasons discussed

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[611] See part 5.3.1 below.

[612] See *Erdemović* (Dissenting Opinion of Judge Cassese) (n 592) para 10. In this dissenting opinion, Judge Cassese stated that:

> "Both the Statute and the Rules deliberately do not make provision for plea bargaining - or, at least, of any endorsement or acknowledgement by the Chambers of out of court plea bargaining. This means, among other things, that the framers of the Statute and the Rules aimed at averting those distortions of the free will of the accused which may be linked to plea bargaining."

[613] Speech of ICTY President Antonio Cassese to the Diplomatic Missions on 11 February 1994 reprinted in Morris and Scharf (n 29) 652.

[614] Rule 62 *bis* of the ICTY RPE (similar to Rule 62 of the ICTR RPE) which deal with the validity of guilty pleas was adopted in 1997 and amended in 1999.

below, changed their stance to welcome plea negotiation, the RPE of both tribunals were further amended to regulate plea agreements.[615]

5.3.1 *The Prosecutor v Drazen Erdemović*

First sentencing judgment

During the conflict in the former Yugoslavia, Srebrenica had been designated as a safe zone by the UN, excluding it from being a legitimate military target, and therefore thousands of Bosnian Muslims took refuge there.[616] However, from 5 July 1995, Srebrenica was attacked by the Bosnian Serb army and when it fell to them on 11 July 1995, the Bosnian Muslims fled and sought refuge in other places. Among the fleeing population of Bosnian Muslims, the Bosnian Serb army and police separated men from women and children and these men were transported to various locations, among them the Branjevo farm in Pilica, where they were executed.[617]

The accused, Drazen Erdemović, a soldier and a member of a unit stationed in Branjevo farm, admitted to being involved in these killings.[618] He explained that he and his colleagues were ordered to line up about 1200 men with their backs to the firing squad and to shoot them.[619] He was later arrested by the authorities of the Federal Republic of Yugoslavia; and on 30 March 1996, he was transferred to the ICTY, where he confessed to the Prosecutor immediately after his arrival.[620]

At the ICTY, he was indicted on one count of crimes against humanity and an alternative count of a violation of the laws or customs of war. He pleaded guilty to the crimes against humanity charge and testified against other accused persons notably Ratco Mladić and Radovan Karadić, the then chief of staff of the army and the President of the Republika Srpska, respectively.[621] However, in addition to his guilty

[615] See Rule 62 *ter* of the ICTY RPE which is similar to Rule 62 *bis* of the ICTR RPE.

[616] *The Prosecutor v Drazen Erdemović* (Sentencing judgment) IT-96-22-T (29 November 1996) [76].

[617] *Erdemović* (sentencing judgment) (n 616) para 2.

[618] *Erdemović* (sentencing judgment) (n 616) para 2.

[619] *Erdemović* (sentencing judgment) (n 616) para 2.

[620] *Erdemović* (sentencing judgment) (n 616) para 81.

[621] *Erdemović* (sentencing judgment) (n 616) para 1.

plea, he stated that he had been forced to commit the killings as his refusal would have endangered his life and the lives of his wife and young child. In this regard, he said:

> "Your Honour, I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: 'If you're sorry for them, stand up, line up with them and we will kill you too.' I am not sorry for myself but for my family, my wife and son who then had nine months, and I could not refuse because then they would have killed me."[622]

On the issue of the formal validity of the guilty plea, the Trial Chamber held that the plea had been "made voluntarily and in full cognisance of the nature of the charge and its consequences".[623] The Trial Chamber recognised that the accused's statement, that he was ordered to commit the crimes and that he did so under the fear for his life and that of his family, constituted a claim of physical duress accompanied by superior orders; which, depending on the circumstances and the available evidence, could present a valid defence or a mitigating factor.[624] The Trial Chamber acknowledged that if duress, accompanied by superior orders, amounted to a legal defence in international criminal law, the Trial Chamber would have had to consider the guilty plea to be ambiguous and therefore invalid.[625] Upon analysis of legal authorities, the Trial Chamber concluded that duress accompanied by superior orders could amount to a legal defence only upon fulfilment of certain restrictive conditions which, in the Trial Chamber's conclusion, were not satisfied by the accused.[626] The Trial Chamber, therefore, held that the guilty plea was valid and proceeded to consider sentencing.

In the sentencing, the Trial Chamber considered the gravity of the crime as well as the personal circumstances surrounding the commission and how the accused conducted himself during the proceedings at the ICTY. The Trial Chamber found that the following were mitigating circumstances: his age - the accused was 23 during the commission of the crime; the fact that he was a subordinate and not a high-ranking officer in the army; the remorse he had expressed; the fact that he had surrendered himself to the

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[622] *Erdemović* (sentencing judgment) (n 616) para 100.

[623] *Erdemović* (sentencing judgment) (n 616) para 11.

[624] *Erdemović* (sentencing judgment) (n 616) para 14.

[625] *Erdemović* (sentencing judgment) (n 616) para 14.

[626] *Erdemović* (sentencing judgment) (n 616) para 19.

Tribunal; his guilty plea; and his cooperation with the prosecution; the fact that the Chamber considered that he did not pose a danger to his community and that he had a corrigible personality.[627] The Trial Chamber did not consider the accused's claim of duress as a mitigating factor since it considered that the accused had failed to furnish proof of the same.[628] On 29 November 1996, the Trial Chamber sentenced him, following the recommendation of the Prosecutor, to 10 years imprisonment.[629]

Appeal judgment

He appealed against the judgment, requesting the Appeals Chamber: to uphold the conviction but to excuse him from serving the sentence since, he argued, he committed the crimes under duress and a real fear for his life and that of his family; or in the alternative, to consider his duress as a mitigating factor and to considerably reduce his sentence.[630] In the appeal judgment issued on 7 October 1997, the Appeals Chamber, *proprio motu*, dealt with the validity of the guilty plea entered by the Appellant. The main point of contention was whether the Trial Chamber rightly held that Erdemović's guilty plea was valid being that it was accompanied by a claim that he had committed the crime under duress.[631] Key to answering this question, was the secondary question of whether a soldier could urge the defence of duress to the crime of killing innocent people during the commission of a war crime or a crime against humanity. In this regard, the judges differed both in terms of conclusions reached and the justifications thereof. As a result, each judge wrote a separate and/or dissenting opinion expressing their views on the matter.[632]

The Appeal's Chamber was in agreement that for a guilty plea to be valid it has to fulfil at least three requirements: it must be voluntary, informed, and non-equivocal.[633]

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[627] *Erdemović* (sentencing judgment) (n 616) para 111.

[628] *Erdemović* (sentencing judgment) (n 616) para 91.

[629] *Erdemović* (sentencing judgment) (n 616) para 111.

[630] *Erdemović* (appeal judgment) (n 238) para 11.

[631] *Erdemović* (Appeal Judgment) (n 238) para 16.

[632] *Erdemović* (Appeal Judgment) (n 238) para 17.

[633] *The Prosecutor v Drazen Erdemović* (Appeal Judgment Joint Separate Opinion of Judge McDonald and Judge Vohrah) IT-96-22-T (7 October 1997) [8]; *Erdemović* (Dissenting Opinion of Judge Cassese) (n 592) para 9; *The Prosecutor v Drazen* (Appeal Judgment Separate and Dissenting Opinion of Judge Stephen) IT-96-22-T (7 October 1997) [15].

Firstly, for a guilty plea to be voluntary it must not be induced by threats or blackmail or any considerations other than the possible desire of the accused to benefit from a lighter sentence. In this regard, the Appeals Chamber, like the Trial Chamber, held that the plea had been voluntary.[634]

Secondly, the plea had to be informed which means that the accused had to be fully cognisant of the charges and their legal consequences. On this issue, the Appeals Chamber was divided. The majority held that the plea was not informed since the accused was not advised on the difference between the alternative charges, being crimes against humanity or war crimes in the alternative. The Majority based this decision on the finding that the accused's counsel did not appear to appreciate the distinction between war crimes and crimes against humanity and that neither the Prosecutor nor the Trial Chamber had explained the said difference to the accused.[635] Consequently, it seemed to the Majority that the accused had unknowingly pleaded guilty to the more serious of the two offenses, that is crimes against humanity, thereby inadvertently attracting a harsher penalty.[636] For this reason the Majority held that the guilty plea was not informed. Judge Li, in his dissenting opinion disagreed with the Majority's assertion that a charge of crimes against humanity is inherently more serious than that of war crimes and, therefore, held that the plea was informed.[637]

Thirdly, on the question of whether the plea was unequivocal the judges differed as well. The Majority, finding that duress was not a complete defence for the crime with which the accused had been charged, held that the plea was unequivocal.[638] Conversely, in each of their separate and dissenting opinions, both judge Stephen and judge Cassese held that duress could be urged as a defence and therefore found that

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[634] *Erdemović* (Appeal Judgment) (n 238) para 18.

[635] See *Erdemović* (Appeal Judgment Joint Separate Opinion of Judge McDonald and Judge Vohrah) (n 633) para 19.

[636] *Erdemović* (Appeal Judgment Joint Separate Opinion of Judge McDonald and Judge Vohrah) (n 633) para 19.

[637] *The Prosecutor v Drazen Erdemović* (Appeal Judgment Separate and Dissenting Opinion of Judge Li) IT-96-22-T (7 October 1997) [18–26].

[638] *Erdemović* (Appeal Judgment Joint Separate Opinion of Judge McDonald and Judge Vohrah) (n 633) paras 88–89.

the plea was equivocal.[639] In conclusion, the Appeals Chamber, by Majority, Judge Li dissenting,[640] remitted the case back to a Trial Chamber, different from the one that had made the impugned decision, so that the Appellant would have an opportunity to plead afresh.[641] Consequently, the Appeals Chamber by majority rejected the request to review the sentence; and, unanimously rejected the Appellant's request for an acquittal.

Second sentencing judgment

Upon his appearance before the second Trial Chamber, Erdemović pleaded guilty to the charge of violations of customs of war and the Prosecutor withdrew the alternative charge of crimes against humanity.[642] The Trial Chamber then explained to the accused the difference between the two charges and the implications of pleading guilty to one as opposed to the other, as had been held by the Majority of the Appeals Chamber. The Trial Chamber then satisfied itself that the guilty plea was valid and convicted the accused. The second Trial Chamber applied the ruling by the Majority of the Appeal's Chamber that duress is not a complete defence for the offence to which the accused had pleaded guilty, therefore held that the plea was unequivocal. They considered his duress in mitigation.

Interestingly, the prosecution and the defence in *Erdemović* entered a plea agreement after the Appeals Chamber judgment and before the second sentencing hearing. This was the first plea agreement received by the ICTY, before there was a provision for it in the ICTY RPE.[643] The Trial Chamber took the agreement, which recommended seven years imprisonment, into consideration but sentenced the accused to five years imprisonment, with credit to time served since detention. [644]

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[639] *Erdemović* (Dissenting Opinion of Judge Cassese) (n 592) para 50. *Erdemović* (Appeal Judgment Separate and Dissenting Opinion of Judge Stephen) (n 633) para 24.

[640] Judge Li in his dissenting opinion found that the guilty plea was valid and opined that the decision of remitting the decision to a trial chamber had no practical purpose and would unnecessarily prolong the proceedings. See *Erdemović (*Appeal Judgment Separate and Dissenting Opinion of Judge Li*)* (n 637) para 27.

[641] *Erdemović (*Appeal Judgment*)* (n 238) para 20.

[642] *The Prosecutor v Drazen Erdemović* (Sentencing Judgment bis) IT-96-22-Tbis (5 March 1998) [8].

[643] *Erdemović* (Sentencing Judgment *bis*) (n 642) paras 18–19.

[644] *Erdemović* (Sentencing Judgment *bis*) (n 642) para 23.

This case made a significant contribution to the law and practice relating to guilty pleas and plea agreements at the *ad hoc* tribunals. The essential elements of a valid guilty plea as identified and defined by the Appeals Chamber judges were later included in both the ICTY and ICTR RPE.[645] This formed the basis of subsequent adjudication of guilty pleas at both the ICTY and the ICTR as discussed below.

5.3.2 The Prosecutor v Kambanda

Guilty plea and sentencing judgment

Jean Kambanda was the Prime Minister of the interim government of Rwanda, from 8 April 1994 to 17 July 1994, during which time the genocide occurred.[646] On 1 May 1998, during his first appearance before the ICTR, he pleaded guilty to six counts contained in the indictment: genocide, conspiracy to commit genocide, incitement to commit genocide, complicity in genocide, crimes against humanity of murder and crimes against humanity of extermination.[647] He also signed a plea agreement with the Prosecutor, under seal, where he admitted all the facts alleged by the Prosecutor.[648]

He admitted *inter alia* that there was a generalised and systematic attack against the Tutsi population where the intention was to exterminate them; that as Prime Minister he was the head of the Council of Ministers which had control over national policy and over the actions of the military; that he participated in meetings where genocide was planned, reports on the execution of the plans discussed and follow ups made; that he gave incendiary speeches which were later repeatedly broadcasted on the radio and financially supported the radio station which was participating in incitement; that he did not take any action to stop or punish those participating in the killing while he punished *prefets*[649] who refused to participate; that he participated in buying and distributing weapons with the knowledge that it would be used to kill Tutsis and moderate Hutus;

[645] See ICTY RPE Rules 62, 62 *bis* and 62 *ter* and ICTR RPE Rules 62 and 62 *bis.*

[646] *The Prosecutor v Jean Kambanda* (Judgment and sentence) ICTR-97-23 (4 September 1998) [42–44].

[647] *Kambanda* (Judgment and Sentence) (n 646) para 3.

[648] *Kambanda* (Judgment and Sentence) (n 646) para 5.

[649] Rwanda is divided into eleven regions called prefectures each of which is governed by a *prefet*.

and, that he ordered the establishment of roadblocks where the killing was done and he personally witnessed some killing.[650]

In addition to his guilty plea and the admission of the above facts, he willingly cooperated with the prosecution, providing information that was vital to the investigations and he was expected to testify in future trials against other perpetrators.[651] However, he neither provided explanation for his crimes nor expressly showed remorse, nor expressed regret for his participation.[652]

Before convicting him, and following the decision of the Appeals Chamber in *Erdemović*, the Trial Chamber sought to confirm the validity of the plea and asked the accused whether his guilty plea was voluntary, informed and unequivocal; he responded in the affirmative.[653] Therefore, the Trial Chamber found that his guilty plea was valid and on that basis, as well as on the basis of the above facts admitted in the plea agreement, convicted him of all the above-mentioned counts of genocide and crimes against humanity.

For the purpose of sentencing, the Defence urged three factors in mitigation: the guilty plea, remorse, and substantial cooperation with the Prosecutor.[654] The Prosecutor agreed that the accused's past and future cooperation should be considered by the Trial Chamber in mitigation.[655] It is noteworthy that the plea agreement did not include a sentence agreement; in fact the prosecution later recommended a life sentence while the defence argued for a term not exceeding two years.[656] The Trial Chamber considered the three factors namely his guilty plea, remorse and cooperation. In discussing these three issues, the Trial Chamber held as follows: first on the guilty plea, the Trial Chamber recognised that a guilty plea is considered as a mitigating

[650] *Kambanda* (Judgment and Sentence) (n 646) para 39.

[651] *Kambanda* (Judgment and Sentence) (n 646) para 47.

[652] *Kambanda* (Judgment and Sentence) (n 646) para 51.

[653] *Kambanda* (Judgment and Sentence) (n 646) para 5.

[654] *Kambanda* (Judgment and Sentence) (n 646) para 46.

[655] Mr Kambanda had already provided information which aided the Prosecutor's investigations and was expected to keep cooperating in future by testifying against other accused persons. *Kambanda* (Judgment and Sentence) (n 646) para 47.

[656] *Kambanda* (Judgment and Sentence) (n 646) para 60. Later plea agreements included sentence agreements as discussed in part 5.4.1 below.

factor in many national jurisdictions, applying both common law and civil law.[657] As for remorse, the Trial Chamber held that the accused had not given any explanation for his voluntary participation in genocide or offered any sympathy for the suffering of the victims of the genocide; and stated that remorse was not the only inference that could be made from a guilty plea. Thirdly, the Trial Chamber acknowledged that the accused had cooperated with the Prosecutor and that his cooperation would encourage other perpetrators to come forward and acknowledge their crimes.[658]

However, the Chamber found that these mitigating factors were negated by aggravating circumstances namely: that the crimes committed by Kambanda were intrinsically grave and particularly shocking to the human conscience; that he had committed the crimes with knowledge and premeditation; and, that as the Prime Minister he had been entrusted with the security and peace of the population, a position which he had abused.[659] For this reason he was sentenced to imprisonment for the remainder of his life.

Appeals Chamber judgment

After the sentence was passed Kambanda refused further cooperation with the Prosecutor and appealed, requesting the Appeals Chamber to quash the conviction or revise the sentence.[660] The appeal was based on eight grounds, three of which relate to his guilty plea, notably its validity and impact on sentence mitigation. The three specific grounds are: that the Trial Chamber had accepted the guilty plea without investigating whether it was voluntary, informed and non-equivocal and based on sufficient facts to prove the crime; that the Trial Chamber had not considered the general principle of law that a guilty plea is accompanied by a sentence reduction; and, that the Trial Chamber had failed to consider the cooperation of the Appellant as a mitigating factor.[661]

The Appeal's Chamber found that the Appellant had had numerous occasions to contest the validity of his guilty plea in a timely manner, but he did not raise any

[657] *Kambanda* (Judgment and Sentence) (n 646) paras 52–53.

[658] *Kambanda* (Judgment and Sentence) (n 646) para 61.

[659] *Kambanda* (Judgment and Sentence) (n 646) para 61.

[660] *The Prosecutor v Jean Kambanda* (Appeal Judgment) ICTR 97-23-A (19 October 2000) [11].

[661] *Kambanda* (Appeal Judgment) (n 660) para 10.

objections except after he had been sentenced to life imprisonment.[662] In the absence of a reasonable justification for the Appellant's silence, the Chamber deemed that it was entitled to hold that the Appellant had waived the right to contest the validity of the plea at the appellate stage. However, because the plea formed the basis of the conviction, as a result of which the Appellant would serve a life sentence, the Appeals Chamber nevertheless decided to consider the issue of the validity. For this reason, the Appeals Chamber allowed the Appellant to testify as to whether his plea had been voluntary, informed and unequivocal.[663]

The Appellant argued that his plea had not been voluntary since at the time of signing the agreement he had been detained and questioned in an unofficial location and had been deprived of his chosen counsel. These incidents, he argued, amounted to an oppressive atmosphere which deprived him of free choice, forcing him to sign the plea agreement.[664] In deciding the matter, the Appeal's Chamber adopted the decision in *Erdemović* which held that for a plea to be voluntary the accused had to have mental capacity to understand the consequences of his actions when pleading guilty; and, that the plea ought not to be motivated by any inducements, threats or promises, apart from the expectation of a reduced sentence.[665] The Appeals Chamber found that the Appellant's assertion that he was depressed at the time of signing the plea agreement did not meet the set criteria. This was especially since the accused, in his previous position as Prime Minister of a country must have been required to make serious decisions under stressful circumstances.[666] The Appeals Chamber therefore rejected the argument that the plea had not been voluntary.

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[662] *Kambanda* (Appeal Judgment) (n 660) para 45.

[663] *Kambanda* (Appeal Judgment) (n 660) para 6.

[664] *Kambanda* (Appeal Judgment) (n 660) paras 57–58. The Appellant had expressed the desire to be represented by Mr Johan Scheers but this was not possible since Mr Scheers was under sanctions imposed by the ICTR Trial Chamber in 1996, as a result of which he had not been reinstated on the list of counsel. For this reason, the Registry proposed the services of Mr Oliver Michaels Inglis, which the Appellant did not oppose at the time. The Appellant later raised this as his first ground of appeal, that he had not been represented by counsel of his choice. The Appeals Chamber dismissed this ground along with others. See *Kambanda* (Appeal Judgment) (n 660) paras 18–21.

[665] *Kambanda* (Appeal Judgment) (n 660) para 61.

[666] *Kambanda* (Appeal Judgment) (n 660) para 62.

On the issue of whether his plea was informed, the Appellant argued that he had had ineffective assistance of counsel whom he said had only had one hour of consultation with him and had not conducted investigations.[667] The Appellant, therefore, argued that at the time he entered the plea, he did not properly understand the charges or the consequences of a guilty plea. The Appellant argued that the Trial Chamber had failed to inform him that the consequence of a guilty plea would be a life sentence and that the guilty plea would not count as a mitigating factor.[668] The Appellant relied on the *Erdemović* case where the Appeals Chamber had found that the accused had not been properly informed of the charges since his counsel appeared not to appreciate the distinction between war crimes and crimes against humanity, with which the accused was charged.

The Appeals Chamber adopted the ruling of judge McDonald and judge Vohrah in *Erdemović* that a plea was informed only if the accused understood the nature of the charges, the nature of a guilty plea and the consequences of pleading guilty in general, as well as the distinction between the charges and the consequences of pleading guilty to one charge rather than the other.[669] The Appeals Chamber did not find any similarity with the *Erdemović* case since in *Kambanda*, there was no indication that defence counsel did not understand the nature of the charges, and had failed to explain the same to the Appellant.[670] The Appeals Chamber found that the Trial Chamber had effectively discharged its duty of informing the Appellant and this was evidenced by the fact that upon questioning by the Trial Chamber the Appellant stated that he fully understood the charges and the consequences of his guilty plea.[671] The Appeals Chamber therefore dismissed the claim that the plea was uninformed.[672]

On the question of whether the plea was equivocal, the Appeals Chamber adopted the definition of an equivocal plea outlined in *Erdemović* where the Appeals Chamber held that a guilty plea is equivocal if it is accompanied by a claim which amounts to a

[667] *Kambanda* (Appeal Judgment) (n 660) para 67.

[668] *Kambanda* (Appeal Judgment) (n 660) para 68.

[669] *Kambanda* (Appeal Judgment) (n 660) para 75.

[670] *Kambanda* (Appeal Judgment) (n 660) para 77.

[671] *Kambanda* (Appeal Judgment) (n 660) para 76.

[672] *Kambanda* (Appeal Judgment) (n 660) para 78.

defence in law.[673] The Appeals Chamber held that Kambanda had not raised any defence either at the time of the plea or after. Furthermore, the Appeals Chamber found that, unlike Erdemović who repeatedly stated that he committed the crime under the fear for his life and that of his family, Kambanda had not given any explanation for his actions.[674] The Appeals Chamber also rejected the Appellant's assertion that he had failed to raise a defence due to ineffective assistance by counsel and held that his plea was unequivocal.[675]

On the question of whether there was sufficient factual basis supporting the plea, the Appeals Chamber found that the Trial Chamber had rightly relied on the plea agreement which confirmed that the parties had agreed on the facts surrounding the alleged charges.[676] The Appeals Chamber noted that there was no disagreement, between the Prosecutor and the Defence, on any of the facts presented by the Prosecutor in the indictment. Therefore, the Trial Chamber had not erred in finding that a factual basis had been established for the guilty plea.[677]

Having found that the guilty plea was valid, the Chamber upheld the conviction and turned to the second aspect of the Appellant's argument that is the request to revise the sentence. In this regard, the Appellant had argued that the Trial Chamber had erred in failing to find that a guilty plea was a mitigating factor which carried with it a reduced sentence and in failing to consider the cooperation of the accused with the Prosecutor.[678] Furthermore, the Appellant argued that the Trial Chamber erred in taking into account, during sentencing, the fact that the Appellant had offered no explanation for his actions.

The Appeals Chamber recognised that the Trial Chamber was indeed under obligation, under Rule 101B of the RPE, to consider mitigating factors during sentencing. The Appeals Chamber however noted that the weight that the Trial Chamber put on the

[673] *Kambanda* (Appeal Judgment) (n 660) para 84.

[674] *Kambanda* (Appeal Judgment) (n 660) para 85.

[675] *Kambanda* (Appeal Judgment) (n 660) para 87.

[676] *Kambanda* (Appeal Judgment) (n 660) para 93.

[677] *Kambanda* (Appeal Judgment) (n 660) para 94.

[678] *Kambanda* (Appeal Judgment) (n 660) para 114.

mitigating factors was a matter of the Trial Chambers discretion.[679] The Appeals Chamber found that the Trial Chamber had indeed considered the guilty plea of the Appellant and his cooperation but had decided that the aggravating factors outweighed the mitigating factors.[680] The Appeals Chamber held that it could not interfere with the Trial Chamber's exercise of discretion unless there was evidence that the Trial Chamber had abused such discretion, evidence which did not exist in this case.[681] The Appeals Chamber found that the sentence imposed by the Trial Chamber fell within the discretionary framework of the ICTR Statute and the RPE and therefore upheld the sentence.[682]

The Trial Chamber in *Kambanda* adopted the decision of the Appeals Chamber in *Erdemović* regarding the essential elements of a valid guilty plea, finding as in *Erdemović* that the guilty plea was valid. However, in *Kambanda*, unlike in *Erdemović*, the guilty plea and cooperation of the accused did not result in a reduced sentence for the accused. In fact, the Trial Chamber gave no weight to these mitigating factors and instead sentenced Kambanda to the most severe sentence permitted in the ICTR statute. However, as shown in part 5.4.3 below, as the policy at the ICTR (and the ICTY) changed in favour of plea negotiation, and as the practice at both tribunals became more streamlined, guilty pleas and cooperation resulted in considerable reduction of sentences for accused persons. After *Kambanda*, no accused person who pleaded guilty ever received the maximum sentence that is life imprisonment.

5.3.3 Change of policy towards plea negotiation at the *ad hoc* tribunals

The *ad hoc* tribunals faced challenges which were largely similar to those affecting the ICC, discussed in chapter 3 of this dissertation. These challenges included novel and

[679] *Kambanda* (Appeal Judgment) (n 660) para 122.

[680] *Kambanda* (Appeal Judgment) (n 660) paras 119–120.

[681] *Kambanda* (Appeal Judgment) (n 660) para 124.

[682] *Kambanda* (Appeal Judgment) (n 660) para 126.

complex procedural law,[683] high cost,[684] insufficient state cooperation,[685] and lengthy proceedings,[686] among other challenges.

[683] Gabrielle Kirk McDonald, the former ICTY President recounts that in 1993 when the first 11 judges met in The Hague, and she was one of them, they had no premises, no permanent staff and no "legal framework to guide the work of the prosecution staff and the judges". See Gabrielle Kirk McDonald, 'Problems, Obstacles and Achievements of the ICTY' (2004) 2 Journal of International Criminal Justice 558, 558. The judges at the ICTY formulated rules of procedure and evidence, pursuant to article 14 of the ICTY Statute, making amendments to tackle new challenges arising as the cases evolved. For example, between 1994, when the ICTY RPE was adopted, till 2005 the ICTY RPE was amended over fifty times. See ICTY RPE, preamble. The ICTY RPE was used almost verbatim for the ICTR RPE.

[684] For example, the ICTY budget was as follows for the following years: 2014-2015 US dollars 179,998,600; 2012-2013 US dollars 250,814,000; 2010-2011 US dollars 286,012,600. It is noteworthy that these figures were even higher in the previous years. See 'The Cost of Justice | International Criminal Tribunal for the Former Yugoslavia' <http://www.icty.org/en/about/tribunal/the-cost-of-justice> accessed 8 June 2018. See also Michael P Scharf, 'Trading Justice for Efficiency - Plea-Bargaining and International Tribunals Symposium on Guilty Plea - Part I: The Theoretical Background' (2004) 2 Journal of International Criminal Justice 1070, 1077. The author argues that though the costs at the ICTY may appear exorbitant, they are reasonable considering the nature of crimes tried and the number of victims involved. He puts this into perspective by comparing costs at the ICTY with that of domestic trials in the United States (US) involving more than 100 victims.

[685] Both the ICTY and the ICTR, like the ICC, had no enforcement mechanisms of their own and had to rely on state cooperation to obtain evidence, arrest and surrender accused persons as well as to enforce sentences imposed on convicted persons. Both Tribunals experienced challenges in this regard, especially the ICTY. The ICTY faced a major challenge since the former Yugoslavia, where conflict was still ongoing, failed to comply with the ICTY requests to arrest and surrender accused persons to the Tribunal. See McDonald (n 681). The author discusses several reports of non-compliance reports which she, in her capacity as the then President of the ICTY, and her predecessor Antonio Cassese, submitted to the UNSC on this issue. Concerning the ICTR, although states were often more willing to cooperate with the ICTR, compared to the ICTY, massive delays were experienced in executing requests. For example, it took the US about four years to extradite Elizaphan Ntakirutimana, due to the accused's efforts to challenge his extradition before the US courts. See 'United States District Court for the Southern District of Texas — Laredo Division: In the Matter of Surrender of Elizaphan Ntakirutimana' (1998) 37 International Legal Materials 398. Secondly, due to the delays in the extradition of Jean-Bosco Barayagwiza from Cameroon, the ICTR judges found that his fair trial rights had been violated and this almost resulted in his release before trial. See a discussion of the same in Dina Temple-Raston, *Justice on the Grass: Three Rwandan Journalists, Their Trial for War Crimes, and a Nation's Quest for Redemption* (Simon and Schuster 2005) 81.

In an attempt to mitigate some of these challenges, the ICTY (and the ICTR) Statutes as well as their RPE were amended, introducing measures intended to improve the operations of both Tribunals.[687] However, the need to make further changes kept mounting. The UNSC and especially the United States government, which contributed about a quarter of the tribunals' funding, put pressure on both tribunals to complete investigations by 2004, first instance trial by 2008 and all their work by 2010.[688]

To this end the ICTY established a Completion Strategy containing two main proposals: one, to focus on the crimes which have the highest impact on international peace and security by prosecuting highest ranking political and military suspects; and two, to transfer cases involving lower ranking officials to the national courts.[689] In this regard, Judge Theodore Meron, the then ICTY President stated that guilty pleas and referral of cases to national jurisdictions had the "the greatest chance of assisting the

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[686] See for example Christina M Carroll, 'An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994' (2000) 18 Boston University International Law Journal 163, 181–183. The author discusses delays in proceedings caused by several issues at the ICTR and opines that these delays might have interfered with the defendant's fair trial rights. See also Combs, 'Copping a Plea to Genocide' (n 27) 90. The author discusses the typical length of an ICTY pre-trial and trial which tended to last ten months and one year respectively.

[687] Some of the changes made included the appointment of *ad litem* judges, delegation of some of the duties of the Trial Chamber judges to senior legal officers, as well as enlargement the common Appeals Chamber of the ICTY and the ICTR. See 'UNSC "Identical Letters Dated 7 September 2000 from the Secretary General Addressed to the President of the General Assembly and the President of the Security Council" UN Doc S/2000/865'. Some scholars also argue that the ICTY judges amended the ICTY RPE to introduce more non adversarial aspects to simplify and speed up the process. See for example Combs, 'Copping a Plea to Genocide' (n 27) 94; Daryl A Mundis, 'The Legal Character and Status of the Rules of Procedure and Evidence of the Ad Hoc International Criminal Tribunals' (2001) 1 International Criminal Law Review 191, 205.

[688] See Bureau of Public Affairs Department Of State. The Office of Electronic Information, 'UN International Criminal Tribunals for Rwanda and the Former Yugoslavia' (28 February 2002) <https://2001-2009.state.gov/s/wci/us_releases/rm/2002/8571.htm> accessed 3 August 2018; Julian A Cook, 'Plea Bargaining at The Hague' (2005) 30 The Yale Journal of International Law 473, 474; UNSC Resolution 1503 (28 August 2003) UN Doc S/RES/1503.

[689] See UNSC "Letter Dated 17 June 2002 from the Secretary General Addressed to the President of the Security Council" UN Doc S/2002/678.

Tribunal in achieving the Completion Strategy."[690] Judge Meron, however, recognised that it would not be appropriate for judges at the ICTY to encourage guilty pleas as such encouragement would violate the fair trial rights of accused persons. He stated that the discretion to seek out and enter plea agreements with accused persons rested entirely with the Prosecutor.[691] The UNSC urged the ICTR to complete a detailed strategy modelled on the above-mentioned ICTY Completion Strategy.[692]

Both Tribunals were required to make bi-annual reports to the UNSC on their respective Completion Strategies. In these reports both tribunals noted the contribution of guilty pleas in helping them complete their work within the stated deadline. For example, in the ICTY May 2004 report the ICTY President noted that:

> "Any further growth in the trial docket would therefore make achievement of the 2008 deadline entirely dependent on the ability to dispose of some pending cases other than by a full trial at the Tribunal. The most effective routes would be guilty pleas by persons currently awaiting trial and referral of cases to domestic jurisdictions under Rule 11*bis*. Guilty pleas or Rule 11*bis* referrals would free up staff and court facilities enabling the conduct of trials in cases that would otherwise require trial work to continue past 2008." [693]

Similarly, in the ICTR Completion Strategy of May 2004 the ICTR President noted that:

> "Guilty pleas reduce the length of trials. Experience shows that not more than a day is needed for a Chamber to satisfy itself that a guilty plea is informed,

[690] 'Assessments and Report of Judge Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, Provided to the Security Council Pursuant to Paragraph 6 of Security Council Resolution 1534 (2004) Annex to UN Doc S/2004/420 (24 May 2004)' para 73.

[691] 'Assessments and Report of Judge Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, Provided to the Security Council Pursuant to Paragraph 6 of Security Council Resolution 1534 (2004) Annex to UN Doc S/2004/420 (24 May 2004)' (n 690) para 72.

[692] UNSC Resolution 1503 (28 August 2003) UN Doc S/RES/1503.

[693] 'Assessments and Report of Judge Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, Provided to the Security Council Pursuant to Paragraph 6 of Security Council Resolution 1534 (2004) Annex to UN Doc S/2004/420 (24 May 2004)' (n 690) para 52.

> unequivocal, and made freely and voluntarily. The writing of the judgment requires a few weeks." [694]

One of the measures taken to make the tribunals better equipped to handle plea negotiation was the amendment of the RPE of both Tribunals. At the ICTY, Rule 62 was amended and Rules 62 *bis* and 62 *ter* adopted in 1999 and in 2001, respectively, to deal with guilty pleas and plea agreement procedure.[695] The same occurred in the ICTR RPE with the amendment of Rule 62 and the adoption of Rule 62 *bis* in 2003.

5.4 Emergence of a streamlined jurisprudence on plea negotiation

After the *ad hoc* tribunals became more receptive towards plea agreements, the practice in both tribunals became relatively harmonised. There were more plea bargains at the ICTY, where 20 accused persons pleaded guilty,[696] than at the ICTR where the number was 10.[697] The total number of guilty pleas at both tribunals, thirty,

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[694]Completion Strategy of the International Criminal Tribunal for Rwanda Annex to UN Doc S/2004/341 (3 May 2004) para 48.

[695] See Rules 62, 62 *bis*, 62 *ter* of ICTY RPE.

[696] The accused who pleaded guilty at the ICTY were: Milan Babić, Predrag Banović, Miroslav Bralo, Ranko Češić, Miroslav Deronjić, Damir Došen, Dražen Erdemovič, Miodrag Jokić, Goran Jelisić, Dragan Kolundžija, Darko Mrđa, Dragan Nikolić, Momir Nikolić, Dragan Obrenović, Biljana Plavšić, Ivica Rajić, Duško Sikirica, Milan Simić, Stevan Todorović, Dragan Zelenović. See 'Guilty Pleas | International Criminal Tribunal for the Former Yugoslavia' <http://www.icty.org/en/cases/guilty-pleas> accessed 10 July 2018. This list excludes those who pleaded guilty after being transferred to the State court of Bosnia and Herzegovina under Rule 11 *bis* of the ICTY RPE.

[697] The cases involving guilty pleas at the ICTR were: *The Prosecutor v Michel Bagaragaza* (Sentencing Judgment) ICTR-2005-86-S (17 November 2009); *The Prosecutor v Paul Bisengimana* (Judgment) ICTR 00-60-T (13 April 2006); *Kambanda* (Judgment and Sentence) (n 646); *The Prosecutor v Joseph Nzabirinda* (Sentencing Judgment) ICTR 2001-77-T (23 February 2007); *The Prosecutor v Juvénal Rugambarara* (Sentencing Judgment) ICTR-00-59-T (16 November 2007); *The Prosecutor v Georges Ruggiu* (Judgment and sentence) ICTR-97-32-I (1 June 2000); *The Prosecutor v Vincent Rutaganira* (Judgment and Sentencing) ICTR-95-1C-T (14 March 2005); *The Prosecutor v Serugendo* (Judgment and Sentence) ICTR-2005-84-I (12 June 2006); *The Prosecutor v Omar Serushago* (Decision Relating to a Plea of Guilty) ICTR- 98-39-T (14 December 1998); *The Prosecutor v GAA* (Judgment and Sentence) ICTR-07-90-R77-I (4 December 2007). The last case is to be distinguished from the rest since it was a contempt case meaning that unlike the other accused who were charged with international crimes, the accused GAA was charged with an offence against the administration of justice at the ICTR (witness tempering).

makes it impractical to discuss each of them in a comprehensive manner in this chapter. Therefore, the method adopted is to discuss some of the salient features of these guilty pleas and their impact on sentencing. This section therefore deals with the general characteristics of a plea agreement, the essential elements of a valid guilty plea and a guilty plea as mitigating factor.

5.4.1 General characteristics of a plea agreement

In the early cases at the ICTY, for example in *Erdemović*, guilty pleas preceded inter-party negotiation. Later, the accused who pleaded guilty generally started by signing a plea agreement accompanied by a document outlining the factual basis of the guilty plea. The agreements which form part of the public record,[698] are very similar and generally contain the following information: first, an introduction stating that the agreement is made between the Prosecutor and the accused through his/ her counsel. The introduction also states that the purpose of the agreement is to aid the Trial Chamber in determining that the plea is made pursuant to Rule 62; meaning that it is voluntary, informed and equivocal, as well as accompanied by a factual basis.[699]

Secondly, the agreement states that the accused pleads guilty to a certain list of crimes, as stated in the indictment and that the guilty plea is voluntary. It also discusses the nature of the offence and explains the charges which the Prosecutor would be required to prove beyond reasonable doubt at trial.[700] Thirdly, it provides for penalty and sentencing stating that the accused acknowledges that upon conviction for the crime to which s/he has pleaded guilty, s/he could be liable to imprisonment for the remainder of their life, according to the ICTY Statute and Rules. The agreement then

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[698] Some of these plea agreements, especially those entered before 2003 were classified as confidential *ex parte* and at the time of writing were still not available on the public record. See for example *The Prosecutor v Todorović* (Sentencing Judgment) IT-95-9/1 (31 July 2001) [7].

[699] *The Prosecutor v Predrag Banovic* (Plea Agreement) IT-02-65-PT (2 June 2003) [1]; *The Prosecutor v Milan Babić* (Plea agreement) IT-03-72-I (22 January 2004*)* [1]; *The Prosecutor v Miroslav Bralo* (Plea agreement) IT-95-17-PT (18 July 2005) [1]; *The Prosecutor v Ranko Češić* (Plea agreement) IT-95-10/1-PT (October 2003) [1–2]; *The Prosecutor v Biljana Plavšić* (Plea Agreement) IT-00-39&40-PT (30 September 2002) [1].

[700] *Banovic* (Plea Agreement) (n 699) paras 3–7; *Babić* (Plea Agreement) (n 699) paras 4–7; *Bralo* (Plea Agreement) (n 699) paras 3–5; *Češić* (Plea Agreement) (n 699) paras 3–9; *Plavšić* (Plea Agreement) (n 699) paras 3–5.

states the sentence agreed on between the parties, if any, and an acknowledgement that the Chamber is not bound by the agreement but will consider both aggravating and mitigating factors to determine sentence.[701] Fourthly, the agreement provides for concessions made by the Prosecution, if any, for example the withdrawal of charges followed by a statement to the effect that no other promises have been made by the Prosecution, apart from those stated in the agreement, to induce the accused to plead guilty.[702]

Additionally, the agreements provide that the accused forfeits certain procedural rights namely: the right to plead not guilty and to have charges against him/her proven by the Prosecutor beyond reasonable doubt; the right to examine witnesses against him/her and to have witnesses against him/her examined; the right to prepare and present a defence at trial; the right to be present at trial and to be represented by counsel of their own choosing; the right to be tried without undue delay; as well as, the right not to be compelled to testify against himself or to plead guilty. The accused however retains the right to be represented by counsel at all stages of the proceedings until the end. [703]

Finally, the accused states that the agreement has been read to him/her in a language s/he fully understands, and that the pertinent issues have been explained by counsel for the accused. The accused acknowledges that counsel has explained the accused's rights under international law, the elements of the crime to which the accused pleads guilty, possible defences that may be raised in the case, as well as possible sentences which the Chamber might impose on the accused. Counsel confirms the same in an appended declaration. In addition, the accused also declares that the agreement has been made freely and voluntarily, and the accused is of sound mind and understands

[701] *Banovic* (Plea Agreement) (n 699) paras 8–10; *Babić* (Plea Agreement) (n 699) paras 11–15; *Bralo* (Plea Agreement) (n 699) paras 6–8; *Češić* (Plea Agreement) (n 699) paras 12–17; *Plavšić* (Plea Agreement) (n 699) paras 6–7. It is noteworthy that earlier plea agreements did not contain sentence agreements see for example *The Prosecutor v Stevan Todorovic* (Sentencing Judgment) IT-95-9/1-S (31 Jul 2001) [79].

[702] *Banovic* (Plea Agreement) (n 699) paras 13–14; *Babić* (Plea Agreement) (n 699) para 19; *Bralo* (Plea Agreement) (n 699) para 9; *Češić* (Plea Agreement) (n 699) para 21; *Plavšić* (Plea Agreement) (n 699) para 9.

[703] *Banovic* (Plea Agreement) (n 699) paras 15–16; *Bralo* (Plea Agreement) (n 699) para 10; *Češić* (Plea Agreement) (n 699) paras 18–19; *Plavšić* (Plea Agreement) (n 699) para 10.

the terms of the agreement. Both the accused and their counsel append their signatures to the agreement.[704] These plea agreements were accompanied by details on the factual basis on which the plea is based, either on the same document as the plea agreement or on a separate document.[705]

At the ICTR, after *Kambanda*, practice was largely similar to the above described ICTY practice. The accused persons pleaded guilty pursuant to plea agreements entered between them and the Prosecutor. It is noteworthy that unlike at the ICTY, the plea agreements entered at the ICTR were not on the public record therefore one can only glean their content with reference to the judgments.[706]

In both tribunals, the Trial Chambers generally considered whether the plea was voluntary, informed, unequivocal, and that the accompanying facts were sufficient to prove the crimes charged, as discussed in part 5.4.2 below. The Chamber then convicted the accused of the crimes to which he had pleaded guilty and proceeded to sentencing. During the sentencing, the Chamber considered aggravating factors such as the gravity of the crime as well as mitigating factors, such as the guilty plea, remorse expressed by the accused and/or cooperation with the Prosecutor.[707]

After balancing the mitigating factors against the aggravating factors, the Chamber would usually issue a sentence deemed appropriate. In most cases the Chamber imposed a sentence within the range proposed by the Prosecutor and Defence in the plea agreement.[708] However there were exceptions where, the Chamber sentenced

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[704] *Banovic* (Plea Agreement) (n 699) paras 16–17; *Babić* (Plea Agreement) (n 699) para 20; *Bralo* (Plea Agreement) (n 699) para 11; *Češić* (Plea Agreement) (n 699) para 22; *Plavšić* (Plea Agreement) (n 699) paras 11–12.

[705] See for example *The Prosecutor v Predrag Banovic* (Annex 1 To Plea Agreement Factual Basis of Plea Agreement) IT-02-65-PT (2 June 2003); *The Prosecutor v Miroslav Bralo* (Factual Basis) IT-95-17-PT (18 July 2005); *The Prosecutor v Ranko Češić* (Factual Basis) IT-95-10/1-PT (October 2003); *The Prosecutor v Biljana Plavšić* (Factual Basis for Plea of Guilt) IT-00-39&40-PT (30 September 2002).

[706] I was not able to find any of these plea agreements on the public record of the ICTR cases. Scholars who refer to them in their articles make the note that they are "on file with author". See for example Nancy Amoury Combs, 'Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentence Discounts' (2006) 59 Vanderbilt Law Review 69 (footnotes 154 and 178).

[707] See part 5.4.3 of this dissertation.

[708] See for example ICTR: *Bagaragaza* (Sentencing Judgment) (n 697) The parties recommended a sentence of between 6 to 10 years, the Chamber sentenced him to 8 years and there was no appeal;

outside this range.[709] Those who received a sentence within the proposed range generally did not appeal those sentences, in line with the plea agreements.[710] Among the few who appealed, the Appeals Chamber generally affirmed the sentences imposed by the Trial Chamber, with a few exceptions at the ICTY.[711] In these

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Nzabirinda (Sentencing Judgment) (n 697) para 75,116 In this case, the parties proposed a sentence of between 5-8 years, the Chamber Sentenced him to 7 years and there was no appeal; *Rugambarara* (Sentencing Judgment) (n 697) paras 48, 61 The parties proposed 9-12 years the Chamber sentenced him to 11 years and there was no appeal; *Serugendo* (Judgment and Sentence) (n 697) paras 79, 95 Parties proposed a sentence of 6-14 years and the Chamber sentenced him to 6 years there was no appeal.

ICTY: *The Prosecutor v Predrag Banović* (Sentencing Judgment) IT-02-65/1-S (28 October 200*3)* [11] Parties recommended not more than 8 years, the Chamber sentenced him to 8 years; *The Prosecutor v Ranko Češić* (Sentencing Judgment) IT-95-10/1-S (11 March 2004) [105] the parties recommended 13-18 years, the Chamber sentenced him to 18 years there was no appeal. ; *The Prosecutor v Duško Sikirica, Damir Došen and Dragan Kolundžija* (Sentencing judgment) IT-95-8-S (13 November 2001) This case involved three co-accused persons and the Chamber stayed within the proposed range as follows: Duško Sikirica - the Parties recommended 10-17 years, the Chamber imposed 15 years; Damir Došen the Parties recommended 5-7 years, the Chamber imposed 5 years; Dragan Kolundžija - the Parties recommended 3-5 years, the Chamber imposed 3 years. None of the accused persons appealed their respective sentence.

[709] See for example ICTR: *Ruggiu* (Judgment and sentence) (n 697) para 81 The defence did not propose any sentence, the Prosecution proposed 20 years but the Chamber sentenced him to 12 years; *Bisengimana* (Judgment) (n 697) paras 186–188 Prosecution and defence proposed a sentence of not more than 14 and 12 years respectively, Chamber sentenced him to 15 years.

ICTY: *The Prosecutor v Milan Babić* (Sentencing Judgment) IT-03-72-S (29 June 2004) [9] Parties recommended no more than 11 years, Chamber sentenced him to 13 years.

[710] See examples in footnote 708 above.

[711] See for example ICTR: *Kambanda* (Appeal Judgment) (n 660) where the accused appealed against the sentence of life imprisonment imposed by the Trial Chamber but the Appeals Chamber affirmed the sentence; *The Omar Serushago v The Prosecutor* (Reasons for judgment) ICTR-98-39-A (6 April 2000) where the accused was sentenced to 15 years and this was affirmed on appeal.

ICTY: *The Prosecutor v Miodrag Jokić* (Judgment on Sentencing Appeal) IT-01-42/1-A (30 August 2005) Accused sentenced to 7 years and this was affirmed on appeal; *The Prosecutor v Goran Jelisić* (Judgment) IT-95-10-A (5 July 2001) where a sentence of 40 years imprisonment was affirmed by the Appeals Chamber.

exceptions, the Appeals Chamber granted some grounds of appeal, rejected others and reduced the sentence by a few years.[712]

5.4.2 Elements of valid guilty pleas at ICTY and ICTR

The criteria for determining the validity of a guilty plea was established by the Appeals Chamber in *Erdemović* which then informed the amendment of both the ICTY and ICTR RPE as discussed above. For a guilty plea to be valid at the *ad hoc* tribunals it had to be voluntary, informed, non-equivocal and accompanied by sufficient factual basis to establish the charge. These essential elements of a valid guilty plea, as expounded on in the jurisprudence of the *ad hoc* tribunals, are discussed in this section.

Voluntary guilty pleas

Both the ICTY and the ICTR RPEs provide that a valid guilty plea must be voluntary.[713]In the *Erdemović* appeal judgment, judges McDonald and Vohrah stated that for a plea to be voluntary "it must be made by an accused who is mentally fit to understand the consequences of pleading guilty and who is not affected by any threats, inducements or promises … other than the expectation of receiving credit for a guilty plea by way of some reduction of sentence."[714] Judge Cassese added that this safeguard was particularly important since an accused person who pleads guilty gives up fundamental fair trial rights, for example, the right to be presumed innocent and the right to question witnesses appearing against the accused.[715]

The element of mental competence, was discussed by both the Trial Chamber and the Appeals Chamber in *Erdemović.* The accused pleaded guilty during his first appearance on 31 May 1996. The Trial Chamber ordered experts to conduct

[712] See for example ICTY: *The Prosecutor v Momir Nikolić* (Judgment on Sentencing Appeal) IT-02-60/1-A (8 March 2006) where the Appeals Chamber granted some grounds of appeal and reduced his sentence from 27 to 20 years; *The Prosecutor v Dragan Nikolić* (Judgment on Sentencing Appeal) IT-94-2-A (4 February 2005) where the Appeals Chamber granted some grounds of appeal and reduced his sentence from 23 to 20 years.

[713] Rule 62 *bis* of ICTY RPE; Rule 62 of ICTR RPE.

[714] *Erdemović* (Appeal Judgment Joint Separate Opinion of Judge McDonald and Judge Vohrah) (n 633) paras 8–10.

[715] *Erdemović* (Dissenting Opinion of Judge Cassese) *(*n 592*)* para 10.

psychiatric tests on him, and on 27 June 1996, the experts reported that he was suffering from a severe post-traumatic stress disorder as a result of which he was not fit to appear before the Chamber or stand trial.[716] The experts recommended a further test to be conducted within six to nine months of the first. A question arose whether a finding that he was not fit to stand trial also implied that he was not fit to plead guilty.[717]

However, this issue became moot since during the second psychiatric evaluation, conducted on 17 October 1996, the experts found that the accused was fit to stand trial. Subsequently, the accused affirmed his guilty plea on numerous occasions, a factor which led the Appeals Chamber to conclude that even if he had been mentally incompetent at the time he entered his initial guilty plea, his subsequent affirmations, made after he was declared competent, compensated for this anomaly.[718] His plea was therefore held to be valid. Similar tests were also ordered in *the Prosecutor v Jelisić* and the Trial Chamber found that the accused was capable of understanding the nature of the charges against him.[719]

At the ICTR, in *Kambanda* the defence argued, while citing *Erdemović*, that Kambanda was not mentally competent to plead guilty because he had been detained in an unofficial location, a fact which created a hostile atmosphere which made the accused depressed, therefore, he lacked the mental capacity to enter a guilty plea.[720] However, the Appeals Chamber rejected this argument finding that the claim that the accused person was depressed at the time he entered the guilty plea was insufficient to invalidate the guilty plea. The Appeals Chamber added that the accused person having served as the Prime Minister of his country ought to have been habituated to making serious decisions under stressful conditions.[721] The Appeals Chamber concluded that his plea was valid.

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[716] *Erdemović* (sentencing judgment) (n 616) para 5.

[717] *Erdemović* (Appeal Judgment Joint Separate Opinion of Judge McDonald and Judge Vohrah) (n 633) para 12.

[718] *Erdemović* (Appeal Judgment Joint Separate Opinion of Judge McDonald and Judge Vohrah) (n 633) para 12.

[719] *The Prosecutor v Goran Jelisić* (Judgment) IT-95-10-T (14 December 1999) [27].

[720] *Kambanda* (Appeal Judgment) (n 660) para 58.

[721] *Kambanda* (Appeal Judgment) (n 660) para 62.

On the second aspect of a voluntary plea, that is whether it was induced by threats or promises rather than the reduction of sentence, plea agreements contained clauses where the accused persons declared their guilty plea was voluntarily.[722] At the sentencing hearing, the Chambers questioned the accused persons on this issue, requiring them to confirm that their guilty pleas were free from threats and inducements. The accused persons generally answered in the affirmative and this satisfied the Chambers who ruled that the plea was voluntary. [723]

Informed

For a guilty plea to be valid it has to be informed.[724] An informed guilty plea is one that is made when the accused person understands: one, the nature of the charges and the consequence of pleading guilty generally; two, in case of the alternative charges, the accused understands the distinction between the charges and the consequence of pleading guilty to one as opposed to the other.[725] This was an area of contention in *Erdemovic* where, as discussed above, the majority held that the accused's guilty plea was not informed because he did not seem to understand the difference between the alternative charges – war crimes and crimes against humanity. The Majority found that he had inadvertently pleaded guilty to the more serious offence of crime against humanity thereby attracting a higher penalty.[726]

In *Kambanda*, the accused appealed against the sentence of life imprisonment arguing *inter alia* that his plea was uninformed because he had not been made aware of the fact that by pleading guilty he would be sentenced to life imprisonment and that his

[722] See discussion in part 5.4.1 above.

[723] See for example ICTY: *The Prosecutor v Momir Nikolić* (Sentencing Judgment) IT-02-60/1-S (2 December 2003) [19–20]; *The Prosecutor v Milan Simić* (Sentencing Judgment) IT-95-9/2-S (17 October 2002) [20].
At the ICTR: *Bisengimana* (Judgment) (n 697) paras 21–23; *Ruggiu* (Judgment and sentence) (n 697) 11–12.

[724] Rule 62 *bis* of ICTY RPE; Rule 62 of ICTR RPE.

[725] *Erdemović* (Appeal Judgment Joint Separate Opinion of Judge McDonald and Judge Vohrah) (n 633) para 14.

[726] See discussion in part 5.3.1 above. It is noteworthy that Judge Li did not agree with the Majority's assessment of this issue therefore found that the plea was informed.

guilty plea would not serve as a mitigating factor.[727] The Appeals Chamber, however, dismissed this argument holding that the accused was aware that if he pleaded guilty he would be convicted, upon which, he could receive a sentence of up to life imprisonment according to the ICTR Statute. The determination of the length of the sentence was at the discretion of the Trial Chamber.[728] The Chamber therefore held that his guilty plea was informed.

In subsequent cases, both at the ICTY and ICTR, the accused signed plea agreements which stated that they understood the nature of the charge, and the consequence of pleading guilty. Some plea agreements contained sentencing agreements by the parties but acknowledged that the decision on sentencing rested with the Chamber which was not bound by the parties' recommendation.[729] Therefore, the issue of whether a guilty plea was informed was no longer contentious. Furthermore, at the sentencing hearing the Chamber would ask the accused whether they understood the indictment against them, whether the content of the plea agreement had been explained to the accused by counsel, whether the accused understood the consequence of a guilty plea, and whether the accused understood that sentencing was at the discretion of the Chamber. The accused persons often answered in the affirmative to the satisfaction of the Chamber.[730]

Unequivocal

Before accepting a guilty plea, the Chamber had to satisfy itself that it is unequivocal.[731] According to the *ad hoc* tribunal's jurisprudence, for a guilty plea to be unequivocal it must not be accompanied by an explanation that amounts to a defence in international criminal law.[732] As discussed above, the issue was discussed at length in *Erdemovic*

[727] See discussion in part 5.3.2 above.

[728] See part 5.3.2 above.

[729] See part 5.4.1 above.

[730] See for example ICTY: *Simić* (Sentencing Judgment) (n 723) para 20; *The Prosecutor v Biljana Plavšić* (Sentencing Judgment) IT-00-39&40/1-S (27 February 2003) [5].
ICTR: *Bisengimana* (Judgment) (n 697) paras 21–23; *Nzabirinda* (Sentencing Judgment) (n 697) para 12.

[731] Rule 62 *bis* of ICTY RPE; Rule 62 of ICTR RPE.

[732] *Erdemović* (Appeal Judgment Joint Separate Opinion of Judge McDonald and Judge Vohrah) (n 633) para 31.

where the contentious issue was whether his plea was equivocal because it was accompanied by the claim that he had committed the crimes under duress.[733] The secondary question was whether duress constituted a defence under international criminal law. The judges were divided in their findings. The Majority held that duress did not amount to a defence in international law but could be a mitigating factor, however, Judge Stephen and Judge Cassese dissented stating that duress amounted to a defence in international law if certain restrictive conditions were fulfilled.[734] Subsequently, both the ICTY and ICTR Chambers followed the Majority ruling in cases which followed.[735]

Similar to the other two requirements of a guilty plea, that it be voluntary and informed, this issue was not contentious in subsequent cases. Many of the plea agreements at the ad hoc tribunals contained a clause recognising that, by pleading guilty, the accused gave up the right to present a defence.[736] Therefore, the Chamber merely asked the accused whether the plea was unequivocal and generally the accused persons answered in the affirmative.[737]

Sufficient factual basis supporting the guilty plea

A guilty plea alone was not sufficient for a Chamber to convict and the Chamber had to satisfy itself that the guilty plea was based on sufficient facts to prove the crime and the accused's participation in it. This was determined either on the basis of objective indicia or lack of material disagreement between the parties on the facts.[738] In *the Prosecutor v Goran Jelisić* the Chamber held that even after the parties agree on the crime charged, "it is still necessary for the Judges to find something in the elements of the case upon which to base their conviction both in law and in fact that the accused

[733] See discussion in part 5.3.1 above.

[734] See discussion in part 5.3.1 above.

[735] See for example *Kambanda* (Appeal Judgment) (n 660) para 84. In this case the Appeals Chamber found that an assertion that the Appellant's case had been 'defendable', without further explanation does not mean that the plea was equivocal.

[736] See discussion in part 5.4.1 above.

[737] See for example ICTR: *Bisengimana* (Judgment) (n 697) paras 21–23; *Nzabirinda* (Sentencing Judgment) (n 697) para 13; *Ruggiu* (Judgment and sentence) (n 697) paras 11–12.

[738] Rule 62 *bis* of ICTY RPE; Rule 62 of ICTR RPE.

is indeed guilty of the crime."[739] In this regard, the Chamber might examine the contents of the plea agreement. However, the Chamber was not confined to facts as agreed on in the plea agreement thus if the chamber was dissatisfied it might conduct a trial on a particular aspect to establish the facts.[740] This too, was generally not a contentious issue since, as discussed above, plea agreements were accompanied by a factual basis containing an agreement between the parties on the crime committed and the accused's participation in it.[741] The Chambers often found the facts in the plea agreement to be sufficient to establish the crime and the accused's participation in it.[742]

Upon satisfying itself that the above four requirements were met, the Chamber would enter a plea of guilty and order the Registrar to set a date for the sentencing hearing.[743] At such hearing the Parties would make submissions on sentencing issues including mitigating factors and the Chamber might allow the presentation of evidence on the same. The following section discusses some of the mitigating factors considered at the *ad hoc* tribunals particularly those related to a guilty plea.

5.4.3 A guilty plea as a mitigating factor in sentencing

When imposing the sentence, the Chambers took into account the gravity of the offence, aggravating factors, mitigating factors, sentencing practices in the Yugoslavia and Rwanda, respectively, and the personal circumstances of the person.[744] On mitigating factors, the RPE requires that the Chamber consider substantial cooperation of the convicted person with the Prosecutor.[745] Other than that, a Chamber has the discretion to take into account any factors it considers to be mitigating in nature. Generally, the Chambers considered many factors in mitigation of sentences including:

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[739] *Jelisić* (Judgment) (n 719) para 25.

[740] *Sikirica et al* (Sentencing judgment) (n 708) para 48.

[741] See part 5.4.1 above.

[742] See for example ICTY: *Simić* (Sentencing Judgment) (n 723) para 21. ICTR: *Bisengimana* (Judgment) (n 697) para 25.

[743] Rule 62 *bis* of ICTY RPE; Rule 62 of ICTR RPE.

[744] Article 24 ICTY Statute and Rule 101 of ICTY RPE; Article 23 of the ICTR Statute and Rule 101 of ICTR RPE.

[745] Rules 101 of the ICTY and ICTR RPE.

a guilty plea,[746] cooperation,[747] voluntary surrender,[748] remorse,[749] duress,[750] diminished mental capacity at the time of the offence,[751] lack of previous convictions,[752] personal circumstances including age,[753] character[754] and family circumstances, as well as acts of kindness to victims.[755]

Guilty Plea

According to the *ad hoc* tribunals' jurisprudence, guilty pleas were important to the work of the tribunals because it: showed that the honesty of the perpetrator, might have encouraged other perpetrators to come forward, saved judicial time and resources, as well as promoted the establishment of the historical truth and reconciliation.[756] For this

[746] See for example *Jelisić* (Judgment) (n 711) para 122; Erdemović (Sentencing Judgment bis) (n 642*)* para 16; *Todorović* (Sentencing Judgment) (n 698) paras 75–82.

[747] See for example *Erdemović* (Sentencing Judgment bis) (n 642) para 16 (iv).

[748] *Simić* (Sentencing Judgment) (n 723) para 107; Plavšić (Sentencing Judgment) (n 730) para 84; *Rutaganira* (Judgment and Sentencing) (n 697) para 145.

[749] *Sikirica et al* (Sentencing judgment) (n 708) para 152,194,230; *Todorović* (Sentencing Judgment) (n 698) 89–92; *Erdemović* (Sentencing Judgment bis) (n 642*)* para 16 (iii).

[750] See for example ICTY: *Erdemović* (Sentencing Judgment bis) (n 642) para 17. ICTR: *Rutaganira* (Judgment and Sentencing) (n 697) paras 161–162.

[751] See *Simić* (Sentencing Judgment) (n 723) para 41 the Chamber accepted it as a mitigating factor although it was not considered as a mitigating factor in this case.

[752] See for example ICTY: *Simić* (Sentencing Judgment) (n 723) para 108. ICTR: *Rutaganira* (Judgment and Sentencing) (n 697) para 130; *Bisengimana* (Judgment) (n 697) para 165.

[753] See *Jelisić* (Judgment) (n 711) paras 129–131; Erdemović (Sentencing Judgment bis) (n 642) para 16 (i) in both cases the Chamber considered the young age of the accused persons. However, in *Plavšić* (Sentencing Judgment) (n 730) para 106; *Rutaganira* (Judgment and Sentencing) (n 695) para 166; *Bisengimana* (Judgment) (n 697) para 175 the Chamber considered the advanced age of the accused persons as a mitigating factor.

[754] See for example ICTR: *Rutaganira* (Judgment and Sentencing) (n 697) paras 122–125; *Bisengimana* (Judgment) (n 697) para 150; *Serugendo* (Judgment and Sentence) (n 697) para 65. ICTY: *Nikolić* (sentencing judgment) (n 723) para 165.

[755] See for example ICTY: *Sikirica et al* (Sentencing judgment) (n 708) paras 195 and 229. ICTR: *Rutaganira* (Judgment and Sentencing) (n 697) para 155; *Serugendo* (Judgment and Sentence) (n 697) paras 68–69.

[756]See for example ICTY: *Banović* (Sentencing Judgment) (n 708) para 68; Erdemović (sentencing judgment) (n 616) para 16; *Nikolić* (sentencing judgment) (n 723) paras 145–147; *Plavšić* (Sentencing Judgment) (n 730) para 180.

reason, a guilty plea was considered as a mitigating factor and the more timely a guilty plea was, the more credit the judges gave it. Although an accused would receive credit for a guilty plea entered at any time, it was preferable for an accused to enter a guilty plea before the commencement of trial. An accused person who pleaded guilty at a later stage of the proceedings received some credit for the guilty plea, although not as much as the credit received by an accused who pleaded guilty before the start of the trial. [757]

In the *Prosecutor v Sikirica et al*, for example, a case involving three accused persons, one of the accused, Kalundzija, who pleaded guilty after the completion of the prosecution case but before the start of the defence case, received "close to full credit" for his guilty plea. This means that he received more credit than his co-accused Sikirica and Došen, who pleaded guilty after the termination of both the prosecution and the defence case.[758] Therefore, the timeliness of the guilty plea also counted in mitigation. In this regard, the Chamber stated (referring to *Sikirica*) that: "It is worth noting that, had he not pleaded guilty in the circumstances of this case, even taking into account the lateness of that plea, he would have received a much longer sentence."[759]

Though the Chambers generally accepted that a guilty plea was a mitigating factor, the weight attached to it was at the discretion of the Chamber and some Chambers, especially in earlier cases, namely *Kambanda* at the ICTR and *Jelisić* at the ICTY chose to put little or no weight on the guilty plea. In *Kambanda*, the Trial Chamber acknowledged that a guilty plea entitled an accused person to sentence reduction but did not give weight to the accused's guilty plea but instead found that the aggravating circumstance negated the mitigating factors, and sentenced him to life imprisonment.[760] Similarly, in *Jelisić*, the Chamber took note of his guilty plea but gave it little weight since the Chamber found that the aggravating factors outweighed the

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ICTR: *Bisengimana* (Judgment) (n 697) para 139; *Ruggiu* (Judgment and sentence) (n 697) paras 53–54; *Rutaganira* (Judgment and Sentencing) (n 697) paras 150–152; *Serugendo* (Judgment and Sentence) (n 697) paras 32–34.

[757] *Sikirica et al* (Sentencing judgment) (n 708) paras 149–150; *Simić* (Sentencing Judgment) *(n 723)* para 85.

[758] *Sikirica et al* (Sentencing judgment) (n 708) para 228.

[759] *Sikirica et al* (Sentencing judgment) (n 708) para 234.

[760] *Kambanda* (Appeal Judgment) (n 660) para 120.

mitigating factors and that the accused had “enthusiastically committed his crimes”. He was sentenced to 40 years imprisonment.[761] On appeal, the Appeals Chamber in both cases declined to interfere with the discretion of the respective Trial Chambers arguing, in both instances, that the Appellants had not provided evidence indicating abuse of discretion by the Trial Chamber.[762]

A guilty plea was a mitigating factor at the ad hoc tribunals and the earlier an accused person pleaded guilty, the more credit they would get for it. But even those who pleaded guilty at later stages of the proceedings received some credit for their guilty pleas and received lower sentences than they would have otherwise received. The weight given to a guilty plea as a mitigating factor varied, generally the Chambers attached significant weight to it, and this led to lower sentences.[763] However, sometimes the Chambers attached little or no weight to guilty pleas as in the two cases discussed above.

Cooperation

The Trial Chambers were obligated to consider substantial cooperation of the accused person with the Prosecutors as a mitigating factor in sentencing.[764] The Chambers, both at the ICTR and ICTY generally imposed reduced sentences on accused persons who cooperated with the Prosecutor or with the Court.[765] However, the question on whether cooperation was ‘substantial’ and therefore amounting to a mitigating factor

[761] *Jelisić (*Judgment) (n 719) paras 129–136.

[762] ICTY: *The Prosecutor v Goran Jelisić* (Judgment) IT-95- 10-A (5 July 2001) [122–123].
ICTR: *Kambanda* (Appeal Judgment) *(n 660)* paras 123–124; see also a similar argument by the Chamber in *Serushago* (Reasons for judgment) (n 711) para 23.

[763] See for example *Plavšić* (Sentencing Judgment) (n 730) para 80. Her guilty plea was considered to be particularly vital to reconciliation in Bosnia and Herzegovina because of her position as the President of Republika Srpska at the time of commission of crimes. Therefore, the Chamber gave a lot weight to it during sentencing.

[764] Rules 101 of the ICTY and ICTR RPE

[765] See for example ICTY: *Banović* (Sentencing Judgment) (n 708) paras 60–61; *Todorović* (Sentencing Judgment) (n 698) para 114; *Sikirica et al* (Sentencing judgment) (n 708) para 227.
ICTR: *Ruggiu* (Judgment and sentence) (n 697) paras 56–58; *Serugendo* (Judgment and Sentence) (n 697) paras 61–62; *The Prosecutor v Omar Serushago* (Sentence) ICTR 98-39-S (5 February 1999) [31–33].

was at the discretion of a Trial Chamber.[766] In determining this, at least three aspects of cooperation were considered: the degree and extent of cooperation, the quality of information provided, and the earnestness of the cooperation which means it is done without expecting any reward in return. These three factors were outlined by the Chamber in *the Prosecutor v Timohir Blaškić*, where it was held:

> "Co-operation with the Prosecutor is the only circumstance explicitly provided for within the terms of the Rules. By this simple fact, it takes on a special importance. The earnestness and degree of co-operation with the Prosecutor decides whether there is reason to reduce the sentence on this ground. Therefore, the evaluation of the accused's co-operation depends both on the quantity and quality of the information he provides. Moreover, the Trial Chamber singles out for mention the spontaneity and selflessness of the co-operation which must be lent without asking for something in return. Providing that the co-operation lent respects the aforesaid requirements, the Trial Chamber classes such co-operation as a "significant mitigating factor."[767]

This ruling was adopted in other cases at both the ICTY and ICTR cases. For example, in *the Prosecutor v Stevan Todorović*, the prosecution argued that considering the benefits which had accrued to the accused from the plea agreement, his cooperation with the Prosecutor could not be considered selfless or to have been rendered without expecting anything in return.[768] However, the Chamber while agreeing with the ruling in *Blaškić* above in principle, pointed out that the fact that the accused has gained or may gain something in return for cooperation with the Prosecutor does not preclude the Chamber from considering such cooperation as a mitigating factor. The Chamber therefore decided to consider the accused's cooperation as a mitigating factor on the determination of the sentence.[769]

Another aspect considered in assessing whether cooperation was substantial is the credibility of the accused and the veracity of the information provided. Therefore, lying or giving untruthful information or being evasive and vague may cause the Chamber

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[766] *Jelisić* (Judgment) (n 711) para 126.

[767] *The Prosecutor v Timohir Blaškić* (Judgment) IT-95-14-T (3 March 2000) [774].

[768] *Todorović* (Sentencing Judgment) (n 698) para 85.

[769] *Todorović* (Sentencing Judgment) (n 698) paras 86–88.

to put less weight on cooperation as a mitigating factor.[770] For example, in *the Prosecutor v Momir Nikolić,* the Trial Chamber chose to attach little weight to the accused's cooperation with the prosecution on the basis that the accused had previously lied about his involvement in certain crimes; a fact which, in the view of the Trial Chamber, affected the credibility of the accused and the veracity of the information provided to the Prosecution and to the Chamber.[771]

However, it is noteworthy that on appeal, though the Appeals Chamber agreed with the Trial Chamber in principle, it found that the Trial Chamber had committed a discernible error by considering that the Appellant had given false information but not considering that the Appellant had admitted to lying and taken initiative to correct the false information, therefore, lessening the impact of the lie. The Appeals Chamber held that these factors should have been considered in assessing the value of cooperation, therefore, the Trial Chamber had given insufficient weight to the Appellant's cooperation.[772]

While cooperation is a mitigating factor, lack of cooperation is not an aggravating factor. For example, in the *Prosecutor v Milan Simić* one of the accused's conditions for entering a plea agreement with the prosecution was that if any information generated as a result would not be used in evidence against his co-accused. The Prosecution accepted this but later argued that his refusal to cooperate in the case against his co-accused should be considered as an aggravating factor. The Chamber did not give credit to the accused for cooperation with the prosecution in the case against co-accused but rejected the argument that lack of cooperation should be an aggravating factor.[773]

The Chambers considered cooperation as a mitigating factor as required by the RPE of both Tribunals but the question of whether cooperation had been substantial was at the discretion of the Chamber. The Chambers took into account many varying factors to determine whether cooperation had been substantial and some of the examples are discussed above. This determined the weight that the Chamber put on cooperation as

[770] *Nikolić* (sentencing judgment) (n 723) para 156.

[771] *Nikolić* (sentencing judgment) (n 723) para 156.

[772] *Nikolić* (Judgment on Sentencing Appeal) (n 712) para 107.

[773] *Simić* (Sentencing Judgment) (n 723) para 89.

a mitigating factor. Sometimes cooperation of the accused was also considered in the decision determining whether the accused could benefit from early release.[774]

Remorse

The Chambers at the *ad hoc* tribunals generally considered the expression of remorse for the crimes committed by the accused person as a mitigating factor based on the belief that it contributed towards reconciliation. Guilty plea and cooperation alone are not sufficient to demonstrate remorse and the accused person generally had to issue a statement explaining their actions, acknowledging the impact of the conflict in general and their actions, in particular, on the lives of the victims; and showing commitment to participate in the truth and reconciliation processes. [775] The accused who took this cause of action generally benefited from lower sentences than those who did not offer an explanation for their actions.[776]

However, for remorse to qualify as a mitigating factor, the Chamber had to be satisfied that the remorse expressed was sincere.[777] For example, in *Jelisić*, the Chamber held that the accused had not expressed any remorse before it and further considered that the remorse expressed by the accused to the psychiatrist did not seem sincere.

[774] See for example the ICTY: *The Prosecutor v Darco Mrda* (Decision of the President on the early release of Darco Mrda) IT-02-59-ES (18 December 2013) [28–30]; *The Prosecutor v Dragan Obrenovic* (Decision of the President on the early release of Dragan Obrenovic) IT-02-60/2-ES (21 September 2011) [25–28].

[775] See for example the ICTY: *Banović* (Sentencing Judgment) (n 708) paras 71–72; *Nikolić* (sentencing judgment) (n 723) paras 160–161; *Plavšić* (Sentencing Judgment) (n 730) para 71; *Simić* (Sentencing Judgment) (n 723) para 94.

The ICTR: *Ruggiu* (Judgment and sentence) (n 697) paras 69–72; *Rutaganira* (Judgment and Sentencing) (n 697) paras 156–158; *Serugendo* (Judgment and Sentence) (n 697) paras 63–64; *Serushago (Sentence)* (n 765) paras 40–42.

[776] See examples in footnote 214 above and contrast with the *Kambanda* case where the Trial Chamber found that he had shown no remorse, had offered no explanation for his actions and shown no sympathy for the victims of his crimes. Therefore, despite his guilty plea and extensive cooperation with the Prosecutor, he was sentenced to life imprisonment. See part 5.3.2 above for detailed discussion of this case.

[777] *Todorović* (Sentencing Judgment) (n 698) para 89.

Remorse was therefore not considered as a mitigating factor and despite his guilty plea he was sentenced to 40 years imprisonment.[778]

The question is how the Chamber can determine that remorse is sincere. For example, in *the Prosecutor v Biljana Plavšić*, the accused person expressed remorse which was taken into consideration by the Trial Chamber and she was sentenced to 11 years imprisonment.[779] She later reportedly told journalists that she had merely expressed remorse to benefit from sentencing concession, which proves that her remorse had not been sincere.[780] There is, therefore, no foolproof method with which the Chamber can determine whether the accused is truly remorseful as discussed further in part 5.5.3 below.

5.5 Critique of plea negotiation at the *ad hoc* tribunals

The use of plea negotiation at the *ad hoc* tribunals was always a controversial issue. Some commentators thought it a necessary addition to the *ad hoc* tribunals,[781] while others, especially those with civil law training showed more reluctance.[782] The supporters argued, *inter alia*, that: plea negotiation is an efficient way to resolve cases fast thereby saving judicial time and resources; the admission of guilt by defendants helps to clarify the historical record in line with the objectives of the Tribunals; and guilty pleas together with expression of remorse foster reconciliation. On the other hand, the opponents argue, *inter alia* that the crimes dealt with at international tribunals are too grievous to be bargained; that plea bargaining runs counter to a transparent

[778] *Jelisić* (Judgment) (n 719).

[779] *Plavšić* (Sentencing Judgment) (n 730) para 71.

[780] See part 5.5.3 below for a detailed discussion of this case.

[781] For example the opinion of Judges Vohrah and McDonald of the ICTY in *Erdemović* appeal where they stated that plea bargaining, should find a ready place at the ICTY since it saves judicial time and costs, and spares witnesses the trouble of traveling to the tribunal and testifying *Erdemović* (Appeal Judgment Joint Separate Opinion of Judge McDonald and Judge Vohrah) (n 633) para 2.

[782] See Combs, 'Copping a Plea to Genocide' (n 27) 139. The author discusses the introduction of plea bargaining at the ICTY stating that the ICTY's civil lawyers and judges were unfamiliar with the concept of plea bargaining and suspicious about its suitability to the ICTY.

process; and, that the victims are denied the opportunity to tell their stories.[783] This part discusses some of these issues.

5.5.1 Practical necessity of plea negotiation

Plea negotiation was incorporated in the Completion Strategies of both the ICTY and the ICTR in response to deadlines set by the UNSC requiring both Tribunals to complete investigations by 2004, first instance trials by 2008 and all their work by 2010. In the beginning, ICTY judges had previously rejected plea negotiation on an ideological basis, arguing that it was incompatible with the role of the Tribunal to prosecute the most serious international crimes; later, they welcomed it as practical tool. Indeed, judge Mellon noted that without plea negotiation the ICTY would not have been able to meet the aforementioned deadline. It is generally accepted that guilty pleas, and by extension plea negotiation, saves judicial time and resources. As judges McDonald and Vohrah of the *ad hoc* Tribunals' Appeals Chamber stated:

> "The concept of the guilty plea per se is the peculiar product of the adversarial system of the common law which recognises the advantage it provides to the public in minimising costs, in the saving of court time and in avoiding the inconvenience to many, particularly to witnesses. This common law institution of the guilty plea should, in our view, find a ready place in an international criminal forum such as the International Tribunal confronted by cases which, by their inherent nature, are very complex and necessarily require lengthy hearings if they go to trial under stringent financial constraints arising from allocations made by the United Nations itself dependent upon the contributions of States."[784]

Similarly, judge Cassese stressed on the contribution of a guilty plea to public good. He said:

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[783] Angela Banks, 'Carla Del Ponte: Her Retrospective of Four Years in The Hague' (2004) 6 International Law Forum du Droit International 37, 38. The author discusses the reflections of the former Prosecutor of the ICTY, Carla Del Ponte, on the advantages and limitations of using plea bargaining at the ICTY.

[784] *Erdemović* (Appeal Judgment Joint Separate Opinion of Judge McDonald and Judge Vohrah) (n 633) para 2.

> "It is apparent from the whole spirit of the Statute and the Rules that, by providing for a guilty plea, the draftsmen intended to enable the accused (as well as the Prosecutor) to avoid a possible lengthy trial with all the attendant difficulties. These difficulties – it bears stressing – are all the more notable in international proceedings. Here, it often proves extremely arduous and time-consuming to collect evidence. In addition, it is imperative for the relevant officials of an international court to fulfil the essential but laborious task of protecting victims and witnesses. Furthermore, international criminal proceedings are expensive, on account of the need to provide a host of facilities to the various parties concerned (simultaneous interpretation into various languages; provision of transcripts for the proceedings, again in various languages; transportation of victims and witnesses from far-away countries; provision of various forms of assistance to them during trial, etc.). Thus, by pleading guilty, the accused undoubtedly contributes to public advantage.[785]

Generally, with a guilty plea the proceedings are much shorter, the judgments take a shorter time to write, and the accused persons agree not to appeal against the conviction therefore there is generally fewer appeals.[786]

The question, however, is at what cost is such judicial economy obtained? Some commentators argue that the *ad hoc* tribunals by widely accepting plea negotiation may have traded justice for judicial efficiency.[787] For example, Judge Hunt, as a member of the ICTY and the ICTR Appeals Chamber, decried measures taken to speedily resolve cases in line with the Completion Strategy.[788] He noted that the

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[785] *Erdemović* (Dissenting Opinion of Judge Cassese) (n 592) para 8.

[786] For example, in the ICTR Completion Strategy report of 2004 the President of the ICTR stated that: "Guilty pleas reduce the length of trials. Experience shows that not more than a day is needed for a Chamber to satisfy itself that a guilty plea is informed, unequivocal, and made freely and voluntarily. The writing of the judgment requires a few weeks." Completion Strategy of the International Criminal Tribunal for Rwanda Annex to UN Doc S/2004/341 (3 May 2004) para 48.

[787] See for example Scharf (n 684).

[788] *The Prosecutor v Milosevic* (Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief) IT-02-54-AR734 (21 October 2003) [20–22]. It is noteworthy that this comment was in not in the context of plea bargaining but rather was about the admission of evidence. The similarity, however, is that both actions were taken to speed up cases to meet the Completion Strategy. See also the concerns expressed by the trial chamber in *Nikolić* (sentencing judgment) (n 723) para 67.

Appeals Chamber Majority in its desire to comply with the Completion Strategy tended to deviate from established interpretations of the ICTY Statute and RPE in a manner which violated the fair trial rights of the accused. He added that the fact that the Tribunal faced the challenge of insufficient time and money was not sufficient justification for the violation of the rights of accused persons.[789]

The second practical advantage of plea negotiation at the *ad hoc* tribunal was that it helped solve challenges related to the collection of evidence. As seen above, a guilty plea, was often accompanied by a factual basis which sometimes provided the Prosecutor with invaluable information which may have otherwise remained unknown. For example, in *Kambanda* the accused, being that he was the acting Prime Minister and the highest official charged with genocide at the ICTR, provided the Prosecutor with vital information which was useful in understanding the conflict and was used in the cases against many other accused persons.[790] Similarly, in *Erdemović* the accused provided the Prosecutor with information which was vital to the investigation, such as where the bodies of the victims of the Srebrenica massacres had been buried, which would not have been known but for the accused's confession.[791] However, the historical truth of the conflict which is constructed from information collected by way of accused persons confessions is often incomplete, which poses a challenge as discussed below.

5.5.2 Establishment of historical truth

Apart from prosecuting and punishing international crime, ending impunity and promoting international peace, another mandate of the *ad hoc* tribunals was to establish the underlying truth of the conflicts in Rwanda and the Former Yugoslavia.[792] The judges repeatedly stated that a guilty plea helps in the establishment of truth in line with this mandate of the tribunal.[793]

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[789] *Milosevic* (Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief) (n 788).

[790] See discussion of the case in part 5.3.2 above.

[791] *Erdemović* (sentencing judgment) (n 616) para 99.

[792] See a summary of the tribunals' mandate in *Nikolić* (sentencing judgment) (n 723) paras 58–63.

[793] See for example *Banović* (Sentencing Judgment) (n 708) para 68; *Sikirica et al* (Sentencing judgment) (n 708) para 149; *Todorović* (Sentencing Judgment) (n 698) para 81; *Erdemović* (Sentencing Judgment bis) (n 642) para 21.

This might have been an overstatement for the following reasons: first, truth is intrinsically a disputed concept especially in the context of international crimes which, unlike domestic crimes, are committed within a political and ideological context. Often, perpetrators of international crimes enact a policy supporting a systematic attack and use propaganda to fuel fear and hatred against would be victims, leading the perpetrators to believe that their actions are justified in defending themselves.[794] This perhaps explains why, despite the conviction of defendants at international tribunals many people in the post-conflict regions deny that horrific crimes were committed and continue to believe in the innocence of the defendants. For example, although convictions at the Nuremberg Tribunal were based on records kept by the convicted persons which proved the commission of crimes, opinion polls conducted in West Germany between 1946-1958 showed that the majority of people believed that the convicted persons were innocent.[795] In addition, despite the many convictions at the ICTY, many people in the Former Yugoslavia deny the version of truth established by the ICTY.[796] Therefore the idea of truth, concerning who were the victims and perpetrators in a conflict, remains disputed irrespective of facts proven beyond

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[794] See for example 'Statement of Guilt: Biljana Plavšić | International Criminal Tribunal for the Former Yugoslavia' <http://www.icty.org/en/content/statement-guilt-biljana-plav%C5%A1i%C4%87> accessed 3 August 2018. Biljana Plavšić, the former President of Republika Srpska explains her motivation to commit crimes as follows:

> "I have now come to the belief and accept the fact that many thousands of innocent people were the victims of an organised, systematic effort to remove Muslims and Croats from the territory claimed by Serbs. At the time, I easily convinced myself that *this was a matter of survival and self-defence*. In fact, it was more. Our leadership, of which I was a necessary part, led an effort which victimised countless innocent people. Explanations of self-defence and survival offer no justification. By the end, it was said, even among our own people, that in this war we had lost our nobility of character. The obvious questions become, if this truth is now self-evident, why did I not see it earlier? And how could our leaders and those who followed have committed such acts? The answer to both questions is, I believe, fear, *a blinding fear that led to an obsession*, especially for those of us for whom the Second World War was a living memory, that Serbs would never again allow themselves to become victims. In this, we in the leadership violated the most basic duty of every human being, the duty to restrain oneself and to respect the human dignity of others. *We were committed to do whatever was necessary to prevail*" (emphasis added).

[795] See Scharf (n 33) 1079.

[796] Clark, 'Plea Bargaining at the ICTY' (n 32) 425–426.

reasonable doubt before international tribunals. It does not help that international tribunals are often far removed from the affected people in terms of physical location, language used, and complexity of legal procedure.[797]

Furthermore, critics have argued that truth revealed at international tribunals is limited because tribunals are governed by stringent rules of evidence which may exclude important information which does not fit the often-restrictive criteria of admissible evidence. This is unlike, for example, truth and reconciliation commissions which have less stringent rules of admissibility of evidence.[798]

The truth becomes even more limited with plea negotiation especially when in involves the withdrawal of some charges or factual allegations. When this happens, the established truth is incomplete and leaves many questions unanswered. [799] The judges at the *ad hoc* tribunals were alive to the fact that withdrawal of charges or factual allegations limit the historical truth because "the public will not know whether the allegations were withdrawn because of insufficient evidence or because they were simply a 'bargaining chip' in the negotiation process."[800] Furthermore, the practice at the tribunal was that a plea agreement would be accompanied by a factual basis which the Chambers could rely on to enter convictions. These documents were often only a few pages long compared to thousands of pages which ordinarily result from judgments rendered by Chambers at the end of a full trial.[801] This further restricted the nature of truth revealed.

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[797] Clark, 'Plea Bargaining at the ICTY' (n 32) 434. The author mentions how the ICTY is far removed from the people of the former Yugoslavia and makes the point that it is important to strengthen the outreach of the ICTY, to bridge the distance, in order to increase its impact on reconciliation.

[798] Anna Petrig, 'Negotiated Justice and the Goals of International Criminal Tribunals' (2008) 8 Chicago-Kent Journal of International and Comparative Law 1, 13.

[799] Mirjan Damaska, 'Negotiated Justice in International Criminal Courts Symposium on Guilty Plea - Part I: The Theoretical Background' (2004) 2 Journal of International Criminal Justice 1018, 1032. Mirjan Damaska, 'Negotiated Justice in International Criminal Courts Symposium on Guilty Plea - Part I: The Theoretical Background' (2004) 2 Journal of International Criminal Justice 1018, 1032; Jelena Subotić, 'The Cruelty of False Remorse: Biljana Plavšić at The Hague' (2012) 36 Southeastern Europe 39, 46.

[800] *Nikolić* (sentencing judgment) (n 723) para 63.

[801] See Scharf (n 33) 1080. The author argues the truth established as a result of plea bargains as compared to a full trial is "only the merest bare-bones."

5.5.3 Impact on reconciliation

The judges at the ICTY and the ICTR generally accepted that guilty pleas foster reconciliation in the Former Yugoslavia and Rwanda, respectively, as the perpetrators admit wrongdoing and show remorse which helps the victims to heal.[802] And some scholars agree that guilty pleas accompanied by remorse can help in the reconciliation process.[803] However, the impact of guilty pleas on reconciliation is dependent on the establishment of truth. The Trial Chamber in *Erdemović* acknowledged this when it stated that "discovering the truth is a cornerstone of the rule of law and a fundamental step on the way to reconciliation: for it is the truth that cleanses the ethnic and religious hatreds and begins the healing process."[804] As discussed above plea negotiation only establishes a limited version of the truth behind conflict. Therefore, if reconciliation is dependent on the establishment of truth, then it follows that the limited nature of truth established via plea negotiation may be a barrier to reconciliation.

In addition, there is the argument that sentence reduction which generally accompanies guilty pleas hinder reconciliation.[805] As discussed in part 5.4.3 above, judges at the *ad hoc* tribunals often considered a guilty plea and other related aspects such as remorse and cooperation as mitigating factors which entitled the accused persons to lower sentences than those meted after a full trial. However, these short sentences arising from guilty pleas tend to embitter victims who feel that the tribunals did not take full account of their suffering.[806] On the contrary, the supporters of the convicted persons were sometimes opposed to the relatively lower sentences

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[802] See for example *Nikolić* (Sentencing Judgment) (n 723) para 72.

[803] Nancy Amoury Combs, 'Prosecutor v. Plavšić. Case No. IT-00-39&40/1-S' (2003) 97 The American Journal of International Law 929, 937. The author makes the argument that guilty pleas and remorse may aid in reconciliation but warns that it would take a long time for such impact to be felt and that the concessions granted by tribunals to encourage guilty pleas may embitter victims hence hindering reconciliation.

[804] *Erdemović* (Sentencing Judgment *bis*) (n 642) para 21.

[805] Clark, 'Plea Bargaining at the ICTY' (n 32) 430.

[806] Amra Kebo, 'Regional Report: Plavšić Sentence Divides Bosnia' (*Institute for War and Peace Reporting*) <https://iwpr.net/global-voices/regional-report-plavsic-sentence-divides> accessed 10 August 2018; 'Bosnian Muslims Protest against UN Tribunal Ruling' *Reuters* (16 September 2009) <https://www.reuters.com/article/idUSLG416125> accessed 10 August 2018.

perceiving them to be too severe.[807] Such mixed reactions are evidence of a deeply polarised society not moving towards reconciliation.[808]

Another issue which impacts on reconciliation is the sincerity of the remorse expressed in conjunction with the guilty plea. As the Trial Chamber stated in *Nikolić*: "when an admission of guilt is coupled with a sincere expression of remorse, a significant opportunity for reconciliation may be created." However, interviews conducted by one scholar in Bosnia and Herzegovina revealed that there was an "overwhelming consensus" among victims that the guilty pleas at the ICTY were disingenuous and only entered by defendants who wanted to benefit from sentencing concessions.[809] This impact must be worse once it becomes clear that the remorse expressed was indeed false like in the case of Biljana Plavšić. The facts were as follows:

Biljana Plavšić was a reputable academic who later joined politics and became the President of Republika Srpska during the war in the former Yugoslavia. On 3 April 2000 she was indicted by the ICTY and accused of genocide, complicity in genocide, and the crimes against humanity of persecutions, extermination and killing, deportation and inhumane acts.[810] On 10 January 2001 she voluntarily surrendered herself to the ICTY. At her first appearance she pleaded not guilty, however, after a plea agreement with the Prosecutor, on 2 October 2002, she pleaded guilty to the charge of crimes against humanity. As part of the agreement, the Prosecutor withdrew the other charges of genocide and complicity to genocide.[811] She issued a statement recognizing her part in the crimes and issued an apology.[812] She however refused to cooperate with the

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[807] Kebo (n 804).

[808] See Janine Natalya Clark, 'The ICTY and the Challenges of Reconciliation in the Former Yugoslavia' (*E-International Relations*) <https://www.e-ir.info/2012/01/23/the-icty-and-the-challenges-of-reconciliation-in-the-former-yugoslavia/> accessed 10 August 2018. The author discusses the opposing narratives of the conflict in the former Yugoslavia held by Serbs and Croats where each group is fixated on the crimes committed against them and not those committed by them.

[809] Clark, 'Plea Bargaining at the ICTY' (n 32) 432. The author however notes that the interviewees in question had not read the statements issued by the defendants they referred to and seemed unaware of the ICTY's general policy towards guilty pleas.

[810] *Plavšić* (Sentencing Judgment) (n 730) para 2.

[811] *Plavšić* (Sentencing Judgment) (n 730) para 5.

[812] 'Statement of Guilt: Biljana Plavšić | International Criminal Tribunal for the Former Yugoslavia' (n 792).

prosecutor and refused to testify or provide any information against her co-accused Momčilo Krajišnik and other accused for example Slobadan Milosevic, the former Serbian President.[813]

During the sentencing hearing, the defence called expert witnesses of "high international reputation" who testified about her invaluable contribution to the signing and implementation of the Dayton Agreements and her role in promoting peace and reconciliation.[814] Furthermore, Dr Alex Boraine, the former Deputy Chairperson of the Truth and Reconciliation Commission of South Africa, testified about the nexus between remorse and reconciliation stressing that full, voluntary and genuine confession and remorse was necessary to provide some closure to victims.[815]

The Chamber considered the evidence given regarding her role in the promotion of peace and reconciliation, as well as her age (72 years old), and expression of remorse and self-surrender and sentenced her to 11 years imprisonment.[816] This was a considerably lower sentence than that meted out on other accused persons charged with similar crimes.[817] The judges considered her guilty plea to be particularly vital to reconciliation in Bosnia and Herzegovina because of her position as the President of Republika Srpska at the time of commission.[818] She was sent to Sweden to serve her sentence.

While in Sweden she gave interviews and wrote a memoire, the content of which brought to question her acceptance of guilt and the sincerity of her remorse.[819] The

[813] *Plavšić* (Sentencing Judgment) (n 730) para 64. It is noteworthy that despite her initial reluctance she eventually testified in the Krajišnik case having been ordered to do so by the Court. She however maintained her refusal to testify in the Milosevic case. See *The Prosecutor v Biljana Plavšić* (Decision of the President on the Application for Pardon or Commutation of Sentence of Mrs Biljana Plavšić) IT-OO-39 & 40/I-ES (14 September 2009) [12].

[814] *Plavšić* (Sentencing Judgment) (n 730) paras 87–94.

[815] *Plavšić* (Sentencing Judgment) (n 730) paras 75–76.

[816] *Plavšić* (Sentencing Judgment) (n 730) para 132.

[817] Combs, 'Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentence Discounts' (n 704) 8. The author analyses the sentences issued at the ICTY, the similarities and differences between the crimes charged in comparison with the sentences imposed.

[818] *Plavšić* (Sentencing Judgment) (n 730) para 80.

[819] See generally Subotić (n 799). The author reproduces lengthy quotes from the relevant sections of Plavsic's interviews and her memoires. I was unable to access the original interviews or the memoires.

narrative she presented was that she had been a victim rather than a perpetrator of international crimes, a narrative which ran contrary to that contained in the factual basis accompanying her guilty plea at the ICTY. She went so far as to say that the only reason she pleaded guilty was to save herself because without the guilty plea, the trial would have taken long, and she might not have survived because of her advanced age.[820] It became apparent that her guilty plea and expression of remorse had been motivated by self-preservation rather than an acceptance of guilt and regret. The judges had deemed her remorse to be sincere and accepted it in mitigation stating that it would help in the process of reconciliation in the Former Yugoslavia, but they had made an error of judgment. The then ICTY Prosecutor, Carla Del Ponte, who had worked on the Plavšić case admitted to having been wrong in her assessment of the situation.[821]

Her memoires and interviews had a negative impact on victims.[822] Despite these memoires, she was granted early release from prison in September 2009, having served two-thirds of her sentence. Her remarks in the interviews and memoires were not mentioned in the early release decision, instead the ICTY President argued that she had "demonstrated substantial evidence of rehabilitation".[823] Upon release, she was picked up from Sweden by a government plane and given a VIP welcome when she returned to Republika Srpska.[824] Biljana Plavšić had committed fraud on the ICTY and gotten away with it.

As stated above, one of the requirements for remorse to be considered as a mitigating factor is that it has to be sincere. And there were instances where the judges declined to reduce an accused's sentence adjudging his remorse insincere, as discussed above. But the *Plavšić* case clearly shows that there is no foolproof way to know

[820] Subotić (n 799) 48.

[821] Carla Del Ponte, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity : A Memoir* (Other Press 2009) 161.

[822] Subotić (n 799) 48.

[823] *Plavšić* (Decision of the President on the Application for Pardon or Commutation of Sentence of Mrs Biljana Plavšić) (n 813) paras 8–13. The decision states that one of the judges consulted expressed concern as to whether Plavšić had shown sufficient evidence of rehabilitation. But the decision does not state the basis of the said judge's concern.

[824] Subotić (n 799) 40.

whether a person is sincere in their expression of remorse or otherwise. The Prosecution and the judges, even while exercising due diligence, may be mistaken as to one's sincerity. An accused may say all the right words but not mean them and later rescind them. There can be no prevention against that. If reconciliation is based on expression of genuine remorse, then false remorse most likely has a negative impact on reconciliation.

Lastly, this debate remains on a theoretical level and there is hardly any empirical research to establish whether guilty pleas and international prosecutions in general foster reconciliation.[825]

5.6 Conclusion

This chapter commenced by discussing the establishment of the *ad hoc* tribunals, their mandate and their composition as well as their procedural law. Then it examined the introduction of plea negotiation focusing on the reasons that led to it. The main reason for the adoption of plea negotiation at the *ad hoc* tribunals was to benefit from the practical advantages of plea negotiation mainly efficiency and saving judicial resources in an attempt to meet the deadline set by the UNSC to finish first instance trials by 2008 and all the Tribunals' work by 2010. In addition, the Chambers argued that guilty pleas promoted establishment of historical truth and fostered reconciliation. However, guilty pleas at the *ad hoc* tribunals were often procured through plea agreements a process which often negatively impacted on the search for truth and reconciliation as discussed above. Guilty pleas indeed helped with faster dispensation of cases, but the Tribunals still missed the set deadlines and only completed their work on 31 December 2015 and on 31 December 2017, for the ICTR and ICTY respectively.

Although the ICC is a permanent court and has no temporal deadline to complete its work, some of the challenges it faces, necessitate research into whether plea negotiation would be a potential solution. To answer this question, it was necessary to discuss the operation of plea negotiation at the ICTY and the ICTR, examining how it worked and critiquing it, as has been done in this chapter. The next Chapter will discuss

[825] Janine Natalya Clark, 'Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation' (2009) 20 European Journal of International Law 415, 434.

whether plea negotiation would be compatible with the philosophical underpinning of the ICC as well as its procedural law.

CHAPTER 6: WHETHER THE ICC SHOULD IMPLEMENT A PLEA NEGOTIATION POLICY

6.1 Introduction

The main research question that this dissertation explored was whether the ICC should implement a plea negotiation policy to mitigate some of the challenges it faces. To provide the foundation for answering this question, the dissertation set out four sub-questions as follows: whether the legal architecture of the ICC supports the practice of plea negotiation; what challenges the ICC faces which plea negotiation might mitigate; what lessons can be learnt from the application of plea negotiation in national jurisdictions; and, what lessons may be learnt from the application of plea negotiation at the ICTY and the ICTR. Each of these questions was dealt with in each of the substantive chapters of this dissertation that is chapters two to five.

To begin with, Chapter One set out the background of the study and the introduction to the research problem. It then highlighted the sources of the procedural law at the ICC which include the Rome Statute, Rules of Procedure and Evidence (RPE), Regulations of the Court, Regulations of the Registry, Regulations of the Office of the Prosecutor, further ancillary instruments on criminal procedure drafted by the ASP as well as policy documents on pertinent issues formulated by the judges. Furthermore, the Chapter outlined the research methodology which is two-pronged: first, a comparative study of the international criminal procedure of the preceding international criminal tribunals (ICTY and ICTR) on the one hand, with the ICC on the other hand. This was done with the view of illustrating the emergence of a *sui generis* international criminal procedure. The second prong was a comparative analysis of plea negotiation as practised in national criminal jurisdictions with common law systems on one hand and civil law systems on the other hand. In this regard, Kenya and South Africa were chosen to represent common law systems, while France and Germany to represent civil law systems. These countries are all states parties to the Rome Statute and therefore their criminal procedure is relevant to the development of practice at the ICC.

Subsequently, each substantive chapter, chapters two to five, tackled each of the dissertation's secondary questions set out above. Chapter Two examined the legal framework of the ICC and established the development of a *sui generis* procedural law. In this regard, this chapter highlighted how the procedural law at the ICC differs from

that of the *ad hoc* tribunals. It also established that the procedural law at the ICC is an amalgam of common law and civil law practices combined together with innovative provisions specific to the unique nature of the ICC. Chapter Three discussed the challenges facing the ICC which were divided into three categories: legal and procedural challenges, political challenges, as well as challenges in relation to the victim participation and reparation regime. Chapter Four dealt with plea negotiation as practised in common law countries represented in the discussion by Kenya and South Africa, on one hand; and civil law countries represented by Germany and France, on the other hand. Chapter Five discussed the use of plea negotiation at the ICTY and the ICTR outlining the development of a streamlined jurisprudence on plea negotiation in both tribunals as well as the role of a guilty plea as a mitigating factor.

This chapter, Chapter Six, is a culmination of the various historical, comparative and international procedural analyses conducted in the preceding chapters. The question, whether the ICC should implement a plea negotiation policy to mitigate some of the challenges it faces, can now be answered. This chapter contains four parts including this introduction. Part two discusses whether the ICC should implement a plea negotiation policy. This question is answered in the affirmative and justified by two arguments: one, that plea negotiation would mitigate some of the challenges the ICC faces; and two, that the ICC has the benefit of learning from best practices and challenges experienced in national jurisdictions and at the *ad hoc* tribunals. Part three discusses whether plea negotiation would fit into the legal and procedural framework of the ICC. This question is also answered in the affirmative and supported by two arguments: one, that the compromise involved in the development of the legal framework of the ICC is akin to the compromise which underpins the practice of plea negotiation; and two, that plea negotiation is permitted by Article 65 of the Rome Statute as implemented in the *Al Mahdi* case. It is however admitted that the legal provisions regarding the admission of guilt are sparse and do not sufficiently provide for a practice as complex and potentially contentious as plea negotiation. Therefore, part four discusses the proposed amendments to the Rome Statute and the RPE which, if implemented, would enhance the capacity of the ICC to adopt a policy of plea negotiation. This part presents the salient features of these proposed amendments which are presented in full in Appendices A and B of this dissertation. Part five concludes the Chapter.

6.2 Whether the ICC should implement a plea negotiation policy

This part argues that the ICC *should* implement a policy of plea negotiation for two reasons: that it would mitigate some of the challenges facing the Court, and that the ICC can pick up best practices and avoid limitations of plea negotiations by considering the experiences of the *ad hoc* tribunals and comparative national jurisdictions.

6.2.1 Plea negotiation would mitigate some of the challenges facing the ICC

The challenges facing the ICC may be divided into three main categories: legal and procedural challenges, political challenges, and challenges related to the victim participation and reparation regime of the ICC.[826] This thesis argues that some of these challenges may be mitigated by implementing a policy of plea negotiation as explained below.

Legal and procedural challenges

One of the legal and procedural challenges facing the Court is the complexity of proceedings. Part of this results from the *sui generis* nature of the procedural law which is very complex and therefore leads to constant litigation between the participants. [827] This leads to lengthy proceedings which are costly and which threaten to infringe on defendants' rights to a speedy trial, especially when the accused person is in pre-trial and trial detention. In this regard, the ICC faces similar challenges to those that informed the implementation of a policy of plea negotiation at the ICTY and the ICTR – namely lengthy and costly proceedings. Admittedly, the two tribunals were temporary and therefore adopted plea negotiation as part of their completion strategy to enable them meet the deadlines set by the UNSC for completion of their work; while the ICC is a permanent institution with no completion deadlines. Nevertheless, the importance of expeditiousness, efficiency and effectiveness at the ICC should not be understated, especially since one of the performance indicators at the ICC is expeditious, transparent and fair proceedings at all stages.[828]

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[826] See discussions of these challenges in Chapter 3 of this thesis.

[827] See discussions in part 3.2 of this thesis

[828] 'Independent Expert Review on the International Criminal Court and the Rome Statute System' (2020) 114 <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER%20-%20Interim%20Report%20ENG.pdf> accessed 26 October 2020; See also International Criminal Court,

Plea negotiation was recognised as a tool which expedites proceedings and makes them more efficient and effective at the ICTY and the ICTR as well as in national jurisdictions as discussed in Chapters Four and Five respectively. The ICC also recognised the importance of a guilty plea, arrived at through a plea agreement, in the *Al Mahdi* case stating *inter alia* that it shortens proceedings and makes them more efficient. For this reason, the ICC should implement a policy of plea negotiation like the ICTY and the ICTR in order to benefit from its practical advantages. However, it is noteworthy that plea negotiation is not without challenges which could potentially derail the delivery of the ICC's mandate. Some of these challenges and how they may be mitigated are discussed in parts 6.2.2 and 6.2.3 below.

Political challenges

One of the political challenges facing the ICC is the apparent bias of the ICC against African states. Pertinent issues have been raised on this subject, by African States Parties as well as other commentators, which deserve to be dealt with by the ICC, if it is to retain its legitimacy among African States Parties.[829] The second political challenge relates to the cooperation of states parties to the Rome Statute. Since the ICC does not have an enforcement mechanism of its own, it relies on states parties to cooperate with it on many levels, including: the arrest and surrender of suspects to the ICC, the authorization to conduct investigations and collect evidence in a state's territory, as well as the enforcement of sentences. The case against former President Bashir illustrates how the ICC has experienced challenges with states parties which have repeatedly failed to cooperate with the Court by refusing to arrest and surrender him when he visited their territories. Eventually, the ICC was forced to hibernate the case against him because his appearance before the Court could not be secured.[830]

'Third Court's Report on the Development of Performance Indicators for the International Criminal Court' (2017) <https://www.opensocietyfoundations.org/sites/default/files/briefing-icc-perforamnce-indicators-20151208.pdf> accessed 7 August 2018.

[829] See discussion in part 3.3.1 of this dissertation.

[830] It is noteworthy that the OTP has ramped up efforts to continue with this case following Mr Bashir's ouster and has in fact visited Sudan for the first time since the UNSC referred the matter in 2005. See 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at a Media Briefing in Khartoum, Sudan: "There Is an Urgent Need for Justice in Sudan. Sustainable Peace and Reconciliation Are Built on the Stabilizing Pillar of Justice."' <https://www.icc-cpi.int/Pages/item.aspx?name=201020-otp-statement-sudan> accessed 26 October 2020.

The third political challenge the Court faces is that of political instrumentalization of the Court whereby states parties use the ICC to settle their political scores, for example, by using the self-referral regime under Article 13 of the Rome Statute to refer the ruling party's political foes to the ICC. This occurred, for example, in the case of Uganda, Cote d'Ivoire and Central African Republic.[831]

The implementation of a plea negotiation policy might mitigate some of the political challenges at the ICC. For example, if an accused person were to plead guilty and cooperate with the prosecution by providing evidence against other accused persons it might be useful in at least two ways: first, it would reduce the dependence of the Prosecutor on a state party's cooperation for the purpose of investigation and collection of evidence. The *Kenyatta* case is instructive in this regard. The Chamber found that the Kenyan government had refused to cooperate with the prosecution in a manner which violated Kenya's obligation to cooperate under Article 87 (7) of the Rome Statute. The Chamber held that:

> "the Kenyan Government's non-compliance has not only compromised the Prosecution's ability to thoroughly investigate the charges, but has ultimately impinged upon the Chamber's ability to fulfil its mandate under Article 64, and in particular, its truth-seeking function in accordance with Article 69 (3) of the Statute."[832]

Arguably, if there had been plea negotiation in this case, it might have reduced the ICC's need for Kenya's cooperation in securing evidence necessary to fulfil the Prosecutor's and the Chamber's mandate. The caveat here is that the decision of an accused person to plead guilty, especially in a high-profile case such as the *Kenyatta* case or *Bashir* case depends on many (political) issues which would be outside the control of the Court. However, this goal may be achieved when the guilty plea is taken by a less high profile accused person, who would then testify against or help in securing

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[831] See discussion is part 3.3.3 of this dissertation. See also Oumar Ba, *States of Justice: The Politics of the International Criminal Court* (Cambridge University Press 2020) <https://www.cambridge.org/core/books/states-of-justice/A919F84A580AB04F29B51817ECB8A192> accessed 6 September 2020.

[832] *The Prosecutor v Uhuru Muigai Kenyatta* (Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute) ICC-01/09-02/11-982 (3 December 2014) [79].

evidence in more high-profile cases, like those that occurred at the ICTY. It is noteworthy that Mr Al Mahdi who pleaded guilty in 2016 to one charge of war crimes in Mali is set to give evidence for the prosecution against of Mr Al Hassan who is also accused of war crimes arising from the same situation.[833] This therefore proves the fact that accused persons who admit guilt could give insider evidence against other accused persons for crimes arising from similar situations.

Secondly, an admission of guilt could increase the legitimacy of the ICC which has become a challenge, especially with some African states parties to the Rome Statute that threatened to withdraw from the ICC. As one scholar noted:

> "an admission of guilt confirms that the prosecution was right to open the case and that the defendant deserves the sentence imposed. Hence, every defendant who shows remorse and co-operation demonstrates that he or she accepts the Court and its rulings."[834]

One of the criticisms levelled against the ICC is that it is a political court and therefore some of the cases are politically motivated and not rightfully before the Court.[835] If an accused person pleads guilty it could help demonstrate that the charges levied against the person are legitimate, that indeed the person committed the crimes charged, that the case is rightfully before the Court, and the person is rightfully charged; thereby helping increase the legitimacy of the Court.

In the same vein, the ICTY remarked that the guilty plea of Ms Plavšić, the President of the then Republika Srpska, sent a powerful message about the legitimacy of the international tribunal and its functions.[836] Be that as it may, it is noteworthy that the sincerity of Ms Plavšić's guilty plea came into question as she later gave interviews and wrote memoirs the contents of which negated her admission of guilt and remorse

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[833] 'ICC: Last Chance to de-Quarantine Justice for Mali' <https://www.justiceinfo.net/en/justiceinfo-comment-and-debate/opinion/45752-icc-last-chance-to-de-quarantine-justice-for-mali.html> accessed 26 October 2020.

[834] Regina Rauxloh, 'Plea Bargaining - A Necessary Tool for the International Criminal Prosecutor' (2011) 94 Judicature 178, 180.

[835] David Hoile, *Justice Denied: The Reality of the International Criminal Court* (The Africa Research Centre 2014) 25.

[836] *The Prosecutor v Biljana Plavšić (Sentencing Judgment) IT-00-39&40/1-S (27 February 2003)* [76].

on the basis of which she had received a sentencing concession.[837] It therefore seemed like she had perpetrated fraud against the ICTY and gotten away with it.[838] This is a risk which the ICC would have to take, because no matter how vigilant judges are, it can be difficult to ascertain the true intentions and sincerity of an accused person's admission of guilt and expression of remorse.

In the same vein, plea negotiation might impact negatively on the legitimacy of the ICC by creating an impression of "unfair back door dealing" especially if it is shrouded in secrecy or is otherwise not transparent.[839] However, if the Court adheres to the procedural safeguards and only accepts guilty pleas that are voluntary, equivocal and informed, it would evince little to no criticism as in the *Al Mahdi* case and would lead to shorter, less expensive proceedings thereby saving judicial time and resources while ensuring the accused person's fair trial rights.

Challenges arising from victim participation and the reparation regime

The third type of challenge discussed arises from the victim participation and reparation regime at the ICC. The ICC is the first international criminal tribunal system to provide for the participation of victims in the proceedings. This is done by the incorporation of a robust and forward-thinking regime which has been hailed as an important addition to international criminal procedural law. However, because the ICC's main focus is on the trial and punishment of persons considered to be most responsible for international crimes, the Court has faced challenges in the implementation of the victim participation and reparation regime.[840] These challenges include balancing of the rights of the accused person with those of the victims as well as offering victims reparations which have so far been merely symbolic and collective.

Besides, the reparation regime at the ICC is tied to conviction which means that without conviction there can be no reparation. In case of a conviction, reparation proceedings commence and run simultaneously with the appeal process. However, the reparation proceedings are terminated as soon as the accused is acquitted on appeal because

[837] See discussion in part 5.5.3 of this dissertation.

[838] See discussion in part 5.5.3 of this dissertation.

[839] Rauxloh (n 34) 180.

[840] See generally Owiso Owiso, 'The International Criminal Court and Reparations: Judicial Innovation or Judicialisation of a Political Process?' (2019) 19 International Criminal Law Review 505.

the legal basis of reparations ceases to exist, which is what happened in the *Bemba* case.[841] In this case, reparation proceedings were running simultaneously with the appeal after Mr Bemba's conviction by the Trial Chamber. Upon Mr Bemba's acquittal by the Appeal's Chamber, the reparation proceedings came to an abrupt stop with the Chamber appreciating the harm caused to the victims and admitting, rightly, that its hands were tied in that it could not issue a reparations order without a conviction.[842] These challenges have prompted experts, like Judge Van den Wyngaert, to consider alternatives such as the separation of the reparations and the trial proceedings so that trials be handled by the ICC and reparations be handled by a Victims Trust Fund and Reparation Commission, both processes operating simultaneously.[843]

Since the current victim reparation regime at the ICC depends on conviction, plea negotiation, which results in a conviction, might aid in this process. The trial would be completed fast, resulting in a certain conviction after which reparations proceedings would commence. Subsequently, a reparation order would be issued, like in the *Al Mahdi* case, and there would be no risk of such a conviction being overturned on appeal unlike in the *Bemba* case. Therefore, a conviction resulting from a plea negotiation and a guilty plea might mitigate some of the challenges facing the Court in relation to the reparation of victims.

Another advantage of plea negotiation in this regard is that victims, who sometimes are also witnesses, are saved the trouble of having to travel to The Hague, The Netherlands to testify. Sometimes the process of providing evidence in Court may lead to re-traumatization of victims and other times it may put their lives and that of their families at risk so that the Court is forced to put them in witness protection. This often means moving them from their ordinary place of residence, away from family and friends, to a location that is considered safe. For this reason, plea negotiation which

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[841] *The Prosecutor v Jean-Pierre Bemba Gombo* (Final Decision on the Reparations Proceedings) ICC-01/05-01/08-3653 (3 August 2018).

[842] *Bemba (Final Decision on the Reparations Proceedings)* (n 16).

[843] Christine Van den Wyngaert, 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge - Presented by the Frederick K. Cox International Law Center' (2011) 44 Case Western Reserve Journal of International Law 475, 495. See also discussion in part 3.4 of this dissertation.

leads to an accused person pleading guilty and thereby eliminating the need for witnesses to testify,[844] would be a beneficial tool.

However, it has been noted that some victims would like an opportunity to tell their stories. Plea negotiation might deny them this opportunity. This would perhaps be exacerbated by the fact that victims do not ordinarily play a prominent role in plea negotiation, as seen in national jurisdictions and the *ad hoc* tribunals. Similarly, the concessions offered to an accused person, by the Prosecutor (and confirmed by the Chamber) in exchange for a guilty plea might anger victims who may feel that the accused person has not received the punishment they deserve for the crimes committed.[845] These are challenges that may be more glaring at the ICC, because unlike other international criminal tribunals, the ICC has both a retributive and restorative mandate, the latter which is fulfilled by the victim participation and reparation regime.

The question which arises, therefore, is if the ICC is to adopt a plea negotiation policy, what role would the victims play? Perhaps the Legal Representative of Victims would be involved in negotiating a plea agreement, alongside the Prosecutor and the defence. However, this suggestion would give rise to a new set of challenges the first of which is that the involvement of victims in a plea agreement is not foreseen by Article 65 (5) of the Rome Statute which envisions “discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed”. It is also debatable whether victims should be allowed to participate in plea negotiation in the first place especially considering the fact that there is no precedent for active victim participation in the negotiation of plea agreements either in national jurisdictions[846] or at the *ad hoc* tribunals. The answers to these questions are beyond the scope of this dissertation and would need to be the subject of further debate and scholarship.

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[844] Under article 65 of RS, the chamber might require to hear witness statements, in addition to an admission of guilt.

[845] Rauxloh (n 34) 181.

[846] See part 4.4.2 of this dissertation which discusses the limited role of victims in plea negotiations in Kenya, South Africa, France and Germany.

6.2.2 Lessons the ICC can learn from the practice of plea negotiation in national jurisdictions

To understand the perspective of both common law and civil law countries, a comparative analysis of the practice in Kenya and South Africa, both common law countries on one hand, and France and Germany as civil law countries on the other hand, was conducted. All four countries are states parties to the Rome Statute therefore members of the ASP whose procedural law can influence that of the ICC. The thesis analysed the development of plea negotiation in all four jurisdictions with regard to three main thematic areas: first, the issue of prosecutorial discretion versus compulsory prosecution whereby common law prosecutors tend to have more prosecutorial discretion, while civil law countries lean more towards compulsory prosecution. Secondly, the issue of participants in plea negotiation, that is the fact that on one hand in common law jurisdictions, plea negotiation is between the prosecutor and the defence, and the role of the judge is that of a neutral arbiter who determines whether the guilty plea was valid. On the other hand, plea negotiation in civil law countries generally involves a judge, in fact in Germany the judge commences the process and proposes an agreement to the prosecutor and defence. In all these jurisdictions, victims have only a limited participation in plea negotiation. Often victims participate in the negotiation of agreement which involves compensation, but this participation is often times subject to the discretion of the prosecutor.

Plea negotiation is practised differently in all the four jurisdictions above, but some similarities abound: one, that the practice is introduced to mitigate challenges facing the criminal justice systems, for example, to deal with an influx of cases in the courts, to clear backlog or to deal with organized crimes. The main reason it is introduced is to benefit from its practical advantages such as shorter proceedings and reduced costs. Secondly, plea negotiation is a controversial practice with many disadvantages such as the potential violation of the rights of the accused and the potential abuse of prosecutorial discretion. Thirdly, many jurisdictions do not allow plea negotiation for sexual offences and for serious crimes including genocide, crimes against humanity and war crimes.

The introduction of plea negotiation to mitigate challenges facing the criminal justice system

In all the four jurisdictions studied, Kenya, South Africa, France and Germany, the practice of plea negotiation was viewed as a way to solve some of the challenges facing the criminal justice system which challenges ranged from the backlog of cases to solving complex white-collar crimes. In the common law jurisdictions, Kenya and South Africa, plea bargaining has a long history although both countries continue to amend their applicable laws and come up with policy documents to regulate plea bargaining. On the other hand, plea negotiation has a more recent history in civil law countries like Germany and France. In fact, there was some resistance to the introduction of plea negotiation in civil law countries because some commentators and practitioners consider it a violation of the fundamental principles which underpin civil law systems. For example, an Article published in 1979 referred to Germany as the 'land without plea bargaining',[847] however, the practice of *abrutschen* arose secretly among practitioners and was so taboo that it took an academic writing using a pseudonym to expose the practice to the public. Eventually, recognizing the practical benefits of plea negotiation, Germany developed legislation, which follows the principles underlying the German criminal law and procedure, to deal with the practice.

As has been established, national jurisdictions, even those which had previously been opposed to the practice, introduce plea negotiation to mitigate practical challenges and to benefit from its practical advantages; therefore, the ICC could borrow a leaf from this. As discussed above, there are many challenges facing the ICC and therefore a policy of plea negotiation should be considered as a way to mitigate some of the challenges facing the Court. This is however only to be done while being mindful of the possible negative aspects of plea negotiation discussed below.

Serious crimes

The common thread in all the four jurisdictions, except South Africa, is that there is an exception to using plea negotiation when it concerns international crimes (crimes against humanity, genocide, war crimes) as well as sexual offences. The rationale of

[847] John H Langbein, 'Land without Plea Bargaining: How the Germans Do It' (1979) 78 Michigan Law Review 204.

this may be that these crimes are too serious for their resolution to be negotiated. This gives credence to the initial reluctance of ICTY judges to introduce plea negotiation at the *ad hoc* tribunals, arguing that the crimes dealt with therein were too serious to be negotiated. This seems to be an accepted rule at the national level, except in South Africa, that crimes of the gravity of which are dealt with at the ICC should not be negotiated. However, as seen below, the international community created an exception to this rule when it allowed plea negotiation at the ICTY and the ICTR both of which prosecuted crimes of a similar magnitude as the ICC, thereby creating precedent for the application of plea negotiation to grave crimes. The ICC should therefore follow this precedent and adopt a policy of plea negotiation to deal with charges arising from crimes within its jurisdiction because of the practical advantages of this practice experienced by the *ad hoc* tribunals and which are discussed below.

Limitations of plea negotiation

According to jurisprudence from national jurisdictions and *ad hoc* tribunals as well as scholarship, plea negotiation results in judicial economy and efficiency in the criminal justice system.[848] However, the question which arises is whether such benefits accrue at too high a cost to the public interest, for the victims and for the defendant. On the one hand, plea negotiation could protect victims from re-traumatization which could be caused by facing their offenders in court. On the other hand, there are concerns raised that the use of plea negotiation excludes victims and denies them an opportunity to participate in the trial process by telling their stories. On the issue of public interest, the question is whether it serves public interest for courts to 'make deals' with guilty persons, instead of trying them and issuing just punishment.

Similarly, there is the issue of the defendant waiving fundamental rights by pleading guilty and giving up the protections afforded to them by fair trial rights. Especially, in common law jurisdictions, the conviction entered as a result of a guilty plea is generally not subject to appeal except if the accused person can prove some misrepresentation on the part of the prosecutor or other extraneous circumstances. In Germany, for example, the court can withdraw the agreement under certain circumstances and if this occurs, the accused is to stand trial under the same tribunal, which places the accused person in a precarious and potentially prejudicial situation. Similarly, plea negotiation

[848] See part 4.5.1 of this thesis.

can be subject to abuse, especially in common law jurisdictions where the prosecutors have wide prosecutorial discretion to institute charges and to discontinue or withdraw them. There is a risk that prosecutors can use their power to pressurise innocent defendants into pleading guilty which has led one commentator to equate plea bargaining with torture of accused persons as practised in medieval times.[849]

A study of the practices at national jurisdictions is beneficial to the ICC because it enables it to foresee some of the pitfalls and put in place mechanisms to deal with them before they arise. Admittedly, some of these limitations may spill over to the ICC should the Court decide to implement a policy of plea negotiation. ICC practitioners and stakeholders would have the difficult task of devising means to mitigate these challenges. One of the ways in which these challenges can be mitigated is by ensuring that an admission of guilt made pursuant to an agreement fulfils some mandatory formal requirements for example: that it is voluntary, informed and unequivocal and accompanied by essential facts establishing that the defendant did commit the crimes for which they admit guilt. These formal requirements are provided for in the Rome Statute and their application was sufficiently dealt with at the preceding *ad hoc* tribunals as discussed below. The ICC should implement a policy of plea negotiation because it has the benefit of learning from the advantages and limitations of plea negotiation as practised at national jurisdiction, as discussed above. Admittedly, some challenges would be unique to the ICC and cannot be foreseen in this manner. The ICC would have to deal with these types of challenges on a case-by-case basis as they arise in practice at the Court.

6.2.3 Lessons the ICC can learn from the practice of plea negotiation at the ICTY and ICTR

The *ad hoc* international criminal tribunals were discussed in this thesis beginning with their establishment, composition and mandate; and then venturing into their procedural law while comparing and contrasting with that of the ICC. It was demonstrated that while the *ad hoc* tribunals' procedural law leaned more toward common law practices, the ICC's procedural law is a *sui generis* system which blends both common law and

[849] See generally John H Langbein, 'Torture and Plea Bargaining' The University of Chicago Law Review 20.

civil law practices as well as other novel creations designed to meet circumstances particular to the ICC. The following lessons may be learned by the ICC from the practice of plea negotiation by the *ad hoc* tribunals:

Implementation of plea negotiation policy to mitigate challenges

The introduction of plea negotiation at the *ad hoc* tribunals was a highly contested issue. At the formulation of the ICTY Statute, the US delegates proposed the incorporation of immunity for defendants who would cooperate with the Court. This proposal was rejected by the ICTY judges, the late Judge Cassese, in his capacity as the president of the ICTY, famously stating that the crimes under the jurisdiction of the ICTY were too grave to allow any form of bargain or immunity no matter how helpful the cooperation of an accused person was.[850] Therefore, in the beginning, the ICTY and later the ICTR did not provide for plea negotiation in their Statutes and RPE.

Later the UNSC gave both tribunals a deadline to complete investigations by 2004, first instance trials by 2008, and all the tribunals' work by 2010. To meet these deadlines, the UNSC invited both tribunals to present their completion strategy. In their strategies, both tribunals listed two ways to expedite proceedings and help meet the deadline: referral of low-profile cases to national jurisdictions and implementing a strategy of plea negotiation. Under new leadership, the ICTY and ICTR were able to successfully implement a plea negotiation policy, amending their Statutes and RPEs to incorporate plea negotiation and applying it in 20 cases at the ICTY and 10 cases at the ICTR.[851] Plea negotiation was therefore introduced as a tool to ensure shorter, faster trials in an attempt to meet the deadlines set by the UNSC.

The ICC is facing similar challenges which faced the *ad hoc* tribunals – namely lengthy, complex and costly trials. Granted, the ICC is a permanent court which does not have a completion deadline which motivated the implementation of a plea negotiation policy at the *ad hoc* tribunals. However, most ICC stakeholders including the ASP, which funds the Court; the victims, the accused persons, counsel and the international community at large appreciate the need for shorter and more efficient trials at the ICC.

[850] See the speech of President Cassese in response to the proposal by the United States reproduced in Virginia Morris and Michael Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis* (Hotei Publishing 1995) 652.

[851] See part 5.4 for the names of the cases in which plea negotiation was practiced in both tribunals.

Currently there is a general dissatisfaction with the ICC's delivery on its mandate. The ICC could borrow a leaf from the *ad hoc* tribunals and introduce plea negotiation as a tool to help mitigate some of the challenges it faces as discussed in part 6.2.2 above.

Development of streamlined jurisprudence

When the *ad hoc* tribunals received their first guilty pleas from two accused persons, Mr Erdemović and Mr Kambanda at the ICTY and the ICTR, respectively, both tribunals were unprepared for them and the decisions were inconsistent. The main question on the *Erdemović* case was whether his guilty plea was valid. He pleaded guilty without a plea agreement and stated that he had committed the crimes charged under duress because his superiors had threated his life and that of his wife and young child. The question before the Chamber was whether this assertion amounted to a defence in international criminal law which would make his guilty plea equivocal and therefore invalid. The Trial Chamber held that his guilty plea was valid. On appeal, the Appeals Chamber was deeply divided on this issue, with some judges holding that his guilty plea was valid, while others held that it was not. In the end, the Appeal's Chamber referred the case back to a different Trial Chamber and required that the accused person re-plead.[852]

The issue of validity of the guilty plea also arose at the ICTR in the *Kambanda* case, albeit in a completely different way. Mr Kambanda pleaded guilty under the assumption that he would receive a sentence concession from the chamber, relying on the *Erdemović* case at the ICTY. The Trial Chamber convicted him on the basis of his guilty plea, but did not give him any concession for pleading guilty but instead sentenced him to life imprisonment. The accused appealed against both the conviction and the sentence, seeking to withdraw his guilty plea on the basis, *inter alia*, that the plea was not informed. In this regard, he argued that he had not received effective advice from counsel and that he was under a lot of pressure when he pleaded guilty. In the alternative, he sought a sentence reduction arguing that the Trial Chamber had failed to follow the principle established in *Erdemović* that a guilty plea entitles an accused person to a reduced sentence. He argued for a sentence of two years' imprisonment. The Appeals Chamber upheld both the conviction and the sentence and the accused

[852] See discussion in part 5.3.1 of this dissertation.

was not allowed to withdraw his guilty plea or receive a sentencing concession for his guilty plea.[853]

At the time the above two cases were determined, the *ad hoc* tribunals had not established guidelines concerning guilty pleas, for example, the essentials of a valid guilty plea and whether a guilty plea should be considered as a mitigating factor. However, going forward, as both tribunals opened their doors to guilty pleas and plea agreements, they amended the law relating to guilty pleas and jurisprudence became more streamlined. For example, it was established that for a guilty plea to be valid it had to be voluntary, informed, unequivocal and supported by essential facts showing that the accused person indeed committed the crime in question. Subsequently, the question of whether a guilty plea was valid did not arise again at either tribunal. Similarly, plea agreements entered into by the accused and the Prosecutor followed a standard format and provided information which demonstrated that the essential ingredients of a guilty plea had been fulfilled. Correspondingly, the tribunals amended the Statutes and RPE (and confirmed in their jurisprudence) that a guilty plea is a mitigating factor in sentencing especially if given timeously and accompanied by remorse and cooperation of the accused.[854]

The ICC has the benefit of learning from the ICTY and the ICTR which had developed a clear, rich and streamlined jurisprudence of guilty pleas and plea agreements which was discussed in great detail in Chapter Five of this dissertation. For example, questions such as what a plea agreement should contain, the essential ingredients of a valid guilty plea as well as the consideration of a guilty plea as a mitigating factor are well established in the ICTY and the ICTR jurisprudence. The ICC should not wait until they are cornered by circumstances, like the *ad hoc* tribunals, in order to adopt a policy of plea negotiation but should learn from the above experience and the jurisprudence established therein. These lessons would be adopted only to the extent that they suit the uniqueness of the ICC. Considering the uniqueness of the ICC procedural law, and borrowing from the procedural law at the *ad hoc* tribunals and national jurisdictions, part 6.3.4 below discusses how the Rome Statute and the ICC RPE can be amended

[853] See discussion of the case in part 5.3.2 of this thesis.

[854] See discussion in part 5.4 of this thesis.

to become more suitable for plea negotiation. These proposed amendments are presented in full in Appendices A and B of this thesis.

The practical benefits of plea negotiation

The judges at both *ad hoc* tribunals considered a guilty plea as a mitigating factor in sentencing, especially if accompanied by remorse and cooperation by the accused person with the Court. Proceedings where accused persons pleaded guilty took much shorter time than those which went through full trial. The judgment could be written in a matter of days therefore saving the tribunal both human and financial resources. Apart from judicial economy, the information collected from accused persons who pleaded guilty and cooperated with the prosecution helped in securing evidence which would not otherwise be secured. Similarly, such information provided by accused persons through plea negotiation helped with the establishment of a historical record. Judges also opined that admission of guilt, when accompanied by remorse, fostered reconciliation in the post-conflict region and could help the healing process of victims.[855]

Similar observations were made by the Trial Chamber in *Al Mahdi* where the Chamber noted that the accused person's guilty plea had helped the Court save time and resources and that his remorse would be helpful in the truth and reconciliation process in Mali. If this was seen in one case, it can be argued that the same would be true if the ICC implemented a policy of plea negotiation which would mean more convictions in a shorter time, with less resources spent, and the information collected during negotiation may help solve other crimes and lead to more convictions. It may also help improve the legitimacy of the Court since, as noted in part 6.2.1 above, when an accused person admits guilt, they acknowledge that they are rightfully before the Court and that they committed the crimes charged. Furthermore, if the accused person acknowledges the harm caused to the victims and expresses remorse, this may facilitate the process of reconciliation in the post-conflict region. This would help the ICC in fulfilling its mandate which is both retributive and restorative. The ICC should therefore adopt a policy of plea negotiation in order to benefit from its practical benefits as observed in the *ad hoc* tribunals and in the *Al Mahdi* case.

[855] See discussion in part 5.4.3 of this dissertation.

However, even as one appreciates the benefits of plea negotiation, one must not lose sight of its limitations especially in the context of an international tribunal and this is also a lesson that the ICC can learn from the *ad hoc* tribunals.

The limitations of plea negotiation

While it is established that plea negotiation has practical benefits such as judicial economy and efficiency, a question arises whether these benefits accrue at the expense of the delivery of justice; and some commentators opine that this is the case.[856] The argument here is that proceedings at international tribunals are necessarily lengthy and complex because they deal with complex subject matter namely international crimes within a political context. Similarly, the procedural hurdles which make the trials lengthy, exist to ensure fair and transparent trials and to protect the rights of the accused persons as well as the interests of the victims. Therefore, introducing a practice like plea negotiation may hinder a tribunal's delivery of justice, for example, by infringing on the rights of the accused person. For example, Judge Hunt, then a member of the ICTY Appeal's Chamber, remarked that in order to attain efficiency in trial, sometimes the ICTY judges deviated from well-established interpretations of the ICTY Statute and RPE in a manner which violated the rights of the accused. He added that the fact that the Tribunal needed to save time and resources was not sufficient grounds to violate the rights of an accused person.[857] However, in this instance violation of an accused person's rights may be avoided by strict adherence to the formal requirements of plea negotiations: that a guilty plea be voluntary, informed, unequivocal and supported by essential facts; and other procedural safe guards proposed in Appendix B to this thesis.

Similarly, the judges at the *ad hoc* tribunals opined that guilty pleas accompanied by cooperation can help in the establishment of the historical truth which was part of the mandate of the *ad hoc* tribunals and that of the ICC. While this may be true, it is also true that the truth achieved pursuant to a plea agreement is merely part of the truth. This is because in a plea agreement often times some facts and/or charges are dropped and the public never gets to know whether this was done because the

[856] See for example Michael Scharf, 'Trading Justice for Efficiency - Plea-Bargaining and International Tribunals' (2004) 2 Journal of International Criminal Justice 1070.

[857] See discussion in part 5.5.1 of this dissertation.

prosecutor had insufficient evidence to prove them or merely as part of some bargaining chip.

Furthermore, the positive impact of plea negotiation on reconciliation was fronted by the judges especially if such admission of guilt is accompanied by acknowledgement of harm caused to the victims and sincere remorse. A challenge arises in situations where the remorse of an accused person is later revealed to have been false and opportunistic like occurred in the *Plavšić* case.[858] One can only imagine the effect on the victims when an accused person, like Madam Plavšić, admits guilt, pretends to be remorseful, benefits from a sentence reduction and later as she is serving her sentence reveals that the remorse she had expressed was false. Even when judges exercise due diligence, there is no foolproof way for a tribunal to establish that the remorse expressed is genuine and so it is a risk which the ICC would have to take if it decides to adopt a plea negotiation policy. Fortunately, this only occurred in one case out of the many cases in which plea agreements were entered into both at the ICTY and ICTR.

It is also noteworthy that the impact of guilty pleas and remorse on reconciliation in a post-conflict area would take a long time to be experienced, if at all, and it is a complex issue for which it would be difficult to prove using empirical evidence. Therefore, the use of plea negotiation remains a complex issue especially in international tribunals where the crimes dealt with are not only grave but also often political.

This thesis argues that the ICC, which deals with crimes of a similar magnitude as the *ad hoc* tribunals, should adopt plea negotiation as occurred in the *ad hoc* tribunals. Even as it adopts the policy it must consider the pitfalls of plea negotiation experienced by the *ad hoc* tribunals. The position of the ICC is even more delicate in the sense that it often intervenes in situations involving ongoing conflicts, unlike say the ICTR which had jurisdiction over a conflict that had since ended. Therefore, the ICC cannot afford to appear to be dealing leniently with accused persons charged with perpetrating mass atrocities in ongoing conflicts. To have an accused person admit guilt and later rescind the admission would have far reaching consequences in situation countries and on the affected communities. It is beneficial that the Court can be aware of these pitfalls from

[858] See discussion of this case in part 5.5.3 of this dissertation.

the experience of the *ad hoc* tribunals and can therefore guard against them to the extent possible or prepare a mechanism of dealing with them on a case-by-case basis if and when they arise.

To conclude, the ICC should adopt a policy of plea negotiation for at least three reasons: first, because it would mitigate some of the legal and procedural challenges, political challenges as well as the challenges relating to the victim participation and reparation regime which the ICC faces in the manner discussed above. Secondly, the ICC can benefit from the practical advantages of plea negotiation as experienced in the *ad hoc* tribunals and at national jurisdictions such as shorter proceedings and judicial economy as has been discussed in this thesis. Thirdly, the ICC can learn from the pitfalls of plea negotiation as experienced in the *ad hoc* tribunals and national jurisdictions such as possible infringement of the accused's rights. This would give the Court foresight and enable it to avoid the avoidable pitfalls and put measures in place to mitigate those that cannot be avoided when they arise. The question which then arises is whether and how plea negotiation would fit into the legal and procedural framework of the ICC.

6.3 Whether and how plea negotiation fits into the legal and procedural framework of the ICC

This part argues that plea negotiation would fit into the legal and procedural framework of the ICC and presents two justifications: first, that plea negotiation and the legal framework of the ICC have a similar philosophical underpinning – that of compromise. Second, Article 65 (5) of the Rome Statute allows for discussions between the accused person and the Prosecutor over admission of guilt by the accused person and amendments of charges and sentences recommendations, which amounts to plea negotiation. Article 65 (5) was implemented in the *Al Mahdi* case which establishes precedence for this practice at the ICC.

6.3.1 The legal framework of the ICC as a product of compromise

The making of multilateral treaties is often a heavily political activity and the Rome Statute was not an exception. Most of the delegates participating in the negotiation of the Rome Statute were politicians and diplomats most of whom had no legal specialization in fields relevant to international criminal law. Therefore, the Rome

Statute was a product of both political and legal compromises and many pertinent issues, such as the powers of the Prosecutor and the role of the UNSC were voted on along political and diplomatic lines. Many alliances were formed and many compromises made in that process.[859] Similarly, the continued role of negotiation and political compromises in the operation of the ICC is seen in the process of the appointment of ICC judges, the Prosecutor and the Registrar.[860]

Apart from political compromises, there were also legal compromises in that the drafting of the Rome Statute involved legal scholars from different jurisdictions with varying legal backgrounds and experiences. They could not agree on many pertinent legal issues and therefore sought legal compromises which were acceptable to most of the drafters involved. One of the legal compromises included the introduction of a Pre-Trial Chamber, which did not exist in previous international criminal tribunals and whose role is to provide judicial supervision to the Prosecutor's powers of investigation and charging. The Pre-Trial Chamber has, for example, the power to authorise the Prosecutor to open investigations, to review the Prosecutor's decision not to open an investigation and to confirm charges.[861]

The above discussion shows the similarity between the philosophical underpinning of the ICC, which is that of compromise, and the very nature of plea negotiation which is also compromise. In order to conclude a treaty which would apply globally and satisfy many competing interests, the drafters of the Rome Statute and the delegates negotiating and voting on it took the middle ground on a number of pertinent issues both legal and political. Similarly, plea negotiation is essentially a compromise in the sense that parties agree not to go to trial, the accused person pleads guilty, giving up key procedural rights, and the prosecution agrees to amend the charges and/or to propose a sentencing concession to the Chamber. The philosophical underpinning of the plea negotiation therefore is similar to that of the Rome Statute; the latter which consists of both legal and political compromises. Therefore, plea negotiation fits into the philosophical framework of the ICC as they both share the same spirit of compromise.

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[859] See discussion in part 2.2.2 of this dissertation.

[860] See discussion in part 2.3.1 of this dissertation.

[861] See discussion in part 2.4.2 of this dissertation.

6.3.2 Article 65 (5) of the Rome Statute and its implementation in the *Al Mahdi* case

Article 65 of the Rome Statute provides for the proceedings on an admission of guilt. Article 65 brings together the practices of both common law and civil law jurisdictions as follows: In common law jurisdictions, a guilty plea, if accepted by the court, leads to automatic conviction of an accused person, while in civil law jurisdictions admission of guilt is merely part of the evidence to be considered by the judge in determining the case. Therefore, as a compromise, Article 65 of the Rome Statute provides that a Trial Chamber will only convict an accused person on the basis of an admission of guilt if such admission accords with the facts as presented by the Prosecutor in the charging document and in any other supplementary documents presented by the Prosecutor; as well as witness statements presented by the Prosecutor or the accused person. In particular, Article 65 (5) provides that: "Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court."

Article 65 is the legal basis of plea negotiation at the ICC. As argued by this author elsewhere:

> "The term 'plea negotiation' does not appear in the Rome Statute nor in practice at the ICC. However, Article 65 of the Rome Statute is very similar to the provisions dealing with plea negotiation in the RPE of the ICTY and ICTR, and before both institutions the term plea negotiation was generally accepted. These provisions allow for discussions between the prosecution and the defence regarding modification of charges and sentencing concessions. However, any agreements reached are not binding on the Tribunal's Chamber. Therefore, it is argued that, despite its *sui generis* nature, Article 65 of the Rome Statute permits plea negotiation as was practised at the ICTY and ICTR." [862]

The *Al Mahdi* case is the first and, thus far, the only case at the ICC where the prosecution and defence have entered into a plea agreement as a result of which the

[862] Phoebe Oyugi and Owiso Owiso, 'Introducing Aspects of Transformative Justice to the International Criminal Court through Plea Negotiation' in Julie Fraser and Brianne McGonigle Leyh (eds), *Intersections of Law and Culture at the International Criminal Court* (Edward Elgar Publishing 2020) 260.

accused person pleaded guilty and parties agreed on the facts of the case as well as the sentence to be imposed on the accused. The judges sentenced the accused within the sentence recommendation presented by the parties in the plea agreement. The Chamber accepted the guilty plea as a mitigating factor stating that guilty pleas were beneficial because they led to speedy trials and contributed to the establishment of truth and the process of reconciliation in post-conflict communities.[863] The *Al Mahdi* case is proof that plea negotiation fits within the unique legal framework of the ICC.

The question whether plea negotiation would fit into the legal framework of the ICC is answered in the affirmative. Article 65 (5) of the Rome Statute provides for discussions between the defence and the prosecution involving the modification of the charges, the admission of guilt or the penalty to be imposed which may lead to amendment of charges or sentence recommendations. The practice defined in Article 65 is plea negotiation - where an accused person enters an agreement with the prosecution to admit guilt in exchange for a reduced charge or sentence, as in the *Al Mahdi case* - although the Rome Statute does not use the term "plea negotiation". The Rome Statute allows for discussions between the accused person and the prosecution about the guilt or innocence of the accused, which phraseology is similar to versions of plea negotiation practised at the *ad hoc* tribunals and at domestic courts as discussed in Chapters Four and Five of this thesis, respectively.

6.3.3 The Prosecution's guidelines for agreements regarding admission of guilt

In October 2020 the Office of the Prosecutor at the ICC (OTP) published Guidelines for Agreements Regarding Admission of Guilt (the Guidelines) which is further proof that plea negotiation fits into the legal framework of the ICC.[864] The purpose of the Guidelines is to guide the OTP on whether and when it may be appropriate to enter such agreements, and if so under what circumstances. The Guidelines begin by summarising the provisions of Article 65 of the Rome statute and recognising that it is a compromise between the traditional common law and civil law approaches to admission of guilt. Thereafter, Article 65 is recognised as the legal basis for discussions

[863] See discussion of the Al Mahdi case in detail in part 2.4.2 of this thesis.

[864] ' Guidelines for Agreements Regarding Admission of Guilt <https://www.icc-cpi.int/itemsDocuments/20201009-Guidelines-for-agreement-regarding-admission-of-guilt-eng.pdf> accessed 18 November 2020 (the Guidelines).

between the accused person and the Prosecutor leading to admission of guilt. Further, the use of guilty pleas at the *ad hoc* tribunals as well as the existence of the provisions relating to guilty pleas in the Rules of Procedure and Evidence of the Special Court for Sierra Leone and the Rules of Procedure and Evidence of the Special Tribunal for Lebanon, is recognised. [865]

In the Guidelines, the OTP recognises the advantages of admission of guilt by accused persons for example: it leads to efficiency, expediency and finality of trials; provides closure and recognition for victims; it can assist in producing evidence which might be relevant for investigations and prosecutions; it eliminates the need for victims and witnesses to travel to The Hague to testify which can be a traumatic experience and which may put their lives and well-being at risk; it may help in establishment of truth which cannot be denied by current or future generations.[866] More importantly, agreements on admission of guilt are recognised as a tool which may assist the OTP in achieving its mandate which is to combat impunity through the prosecution of individuals most responsible for international crimes. These advantages have also been recognised in this thesis particularly in part 6.2 above and form the basis of the thesis' conclusion that a policy of plea negotiation should be developed at the ICC. However, the Guidelines also recognise the possible limitations of such agreements for example: while admission of guilt shorten trials, it may lead to less than fully developed case record. To remedy this shortcoming, the Guidelines require the OTP to ensure that "all agreements contain a detailed and thorough statement of the facts underlying the admission of guilt. Such facts should address all the essential facts required for a conviction."[867]

Although the term "plea negotiation" is not utilised in the Guidelines, they concern the agreements between the Prosecutor and the accused person leading to admission of guilt by the accused while the Prosecutor agrees to amend changes or recommend an appropriate sentence to the Chamber. This process has been termed as plea-negotiation in this thesis, therefore the Guidelines are proof that the practice fits into

[865] The Guidelines (n 864) paras 1-4.

[866] The Guidelines (n 864) paras 12, 19, 21, 25.

[867] The Guidelines (n 864) para 23.

the legal framework at the ICC and has many practical advantages, highlighted in the preceding paragraph, from which the Court can benefit.

6.4. The proposed amendments to the Rome Statute and the RPE

Although plea negotiation fits into the ICC framework, this thesis argues that the Rome Statute and the RPE need to be amended to include comprehensive provisions which deal directly with the practice. This is for two reasons: the first is the uniqueness of the procedural law at the ICC; and the second is that the current provisions, Article 65 and Rule 139 are sparse.

First, on the issue of uniqueness of ICC procedure, an analysis of the procedural law at the ICC, and how this applies at different stages from the investigations through to pre-trial, trial, judgment, sentencing, appeal, enforcement of sentences and reparations; revealed that there has been a development of a new *sui generis* international criminal procedure at the ICC.[868] Besides, there is a victim participation and reparation regime which is unique to the ICC. This uniqueness is further evident from a comparison of the procedural law of the ICC, on one hand, and that of the ICTY and the ICTR, as well as that of selected and representative national jurisdictions, on the other hand. This comparative study also revealed that there has been a development of a new *sui generis* international criminal procedure at the ICC, which is different from that of preceding tribunals, and national jurisdictions. This procedural law is continuously being developed through jurisprudence as well as through the formulation of policy documents to deal with pertinent issues unique to the ICC.[869] Plea negotiation has been implemented in national jurisdictions with either common law or civil law practices. It has also been applied to the ICTY and ICTR, which dealt with crimes of equal magnitude as the ICC, but whose procedural law was borrowed largely from common law practices. The unique nature of the proceedings at the ICC could give rise to further complexities which have not been experienced either at the *ad hoc* tribunals or in domestic courts. This gives rise to the need to amend Article 65 to adequately cater to plea negotiation under this unique procedure for the avoidance of doubt.

[868] See part 2.4 of this dissertation.

[869] See part 2.4 of this dissertation.

Secondly, the provisions relating to admission of guilt namely Article 65 of the Rome Statute and Rule 139 of the RPE, do not adequately cover all the intricacies of the practice. This challenge was faced at the ICTY and ICTR where a policy of plea negotiation was introduced but the procedural law did not adequately provide for it. The challenges faced at the ICTY in the *Erdemović* case and at the ICTR in the *Kambanda* case gave rise to the need to amend both ICTY and ICTR Statutes and RPEs to resolve controversies and to cover outstanding issues.[870] Adequate provision is necessary as plea negotiation can be a controversial practice and there can be a lot of inconsistencies in the practice of the Court if the law and regulations are not sufficiently clear.

This thesis recommends amendments to the Rome Statute and the Rules of Procedure and Evidence, which provide sufficient safeguards to cushion the ICC from experiencing the challenges experienced by the *ad hoc* tribunals in case the ICC decides to adopt a policy of plea negotiation. This thesis envisions the inclusion of Article 65 *bis* of the Rome Statute and Rule 139 *bis* of the RPE, to amend the existing provisions on admission of guilt in Article 65 and Rule 139, respectively. The proposed amendments would provide specifically for plea negotiation at the ICC, and the procedure thereof, for the avoidance of doubt. The proposed provisions are presented in full in Appendices A and B of this thesis. This part highlights some of the salient features of these proposed provisions and explains their justification.

To begin with, the proposed Article 65 *bis* (1) would provide *inter alia* that:

> "*At any time after the confirmation of charges by the Pre-Trial Chamber*, the Prosecutor and defence may commence negotiation with the aim of concluding an agreement according to which, upon the accused making an admission of guilt, the Prosecutor shall take one or more of the following actions…" (emphasis added).

It is noteworthy that the proposed amendments envisage plea negotiation at the ICC occurring after the confirmation of charges by the Pre-Trial Chamber; which makes it part of the mandate of the Trial Chamber. This allows the Pre-Trial Chamber, which

[870] See part 5.4 of this dissertation.

was a *sui generis* addition of the ICC,[871] to carry out its mandate before plea negotiation can commence. This mandate includes supervision of the investigative powers of the Prosecutor, the protection of the rights of suspects and the issuance of arrest warrants and the confirmation of charges. To confirm charges the Pre-Trial Chamber conducts a hearing in order to "determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged."[872] In the Court's jurisprudence, these are known as the "gate keeping functions" of the Pre-Trial Chamber. In this regard it has been held that:

> "The fundamental function of the control exercised by the Pre-Trial Chamber through the confirmation decision is not only to filter out weak cases, but also (and, critically, every time a confirmation does occur) to set the factual boundaries of the trial by declining to confirm those charges which are not supported by 'sufficient evidence to establish substantial grounds' as set out in Article 60(5) and (7), consistently with the 'gatekeeper function of the Pre-Trial Chamber according to which […] only those cases proceed to trial for which the Prosecutor has presented sufficiently compelling evidence going beyond mere theory or suspicion.'"[873]

For the foregoing reasons, the author proposes that the process of plea negotiation should only commence after the conclusion of the pre-trial stage of the proceedings which is essentially after the Pre-Trial Chamber has carried out this vital gatekeeping function. This would ensure that accused persons can only admit guilt to charges which are backed to a degree by the evidence in the prosecution's custody to the satisfaction of the Pre-Trial Chamber. An admission of guilt given at this stage, if it leads to a

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[871] See part 2.3.1 of this dissertation.

[872] Article 61 (7) of the RS.

[873] *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* (Decision on the 'Prosecution's Request to Amend Charges pursuant to Article 61(9) and for Correction of the Decision on the Confirmation of Charges, and Notice of Intention to Add Additional Charges') ICC-01/14-01/18-517 (14 May 2020) para 23. See also *The Prosecutor v. Laurent Gbagbo* (Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute) ICC-02/11-01/11-432 (3 June 2013); *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* (Decision on the Prosecution's Application for Notice to be given pursuant to Regulation 55(2) on Mr Yekatom's Individual Criminal Responsibility) ICC-01/14-01/18-542 (2 June 2020) para 15.

conviction, would save the Court a considerable amount of time as it would cut short the trial stage of the proceedings.[874]

The proposed Article 65 *bis* further provides that "the Prosecutor and defence may commence negotiation with the aim of concluding an agreement according to which, upon the accused *making an admission of guilt*…" (emphasis added). Here it is noteworthy that the phrase "admission of guilt" is preferred as opposed to the term "plea of guilty" used at the *ad hoc* tribunals.[875] This is to signify the unique nature of an admission of guilt at the ICC which does not automatically lead to a conviction,[876] instead upon admission of guilt the Chamber has to be satisfied that: the accused understands the nature and consequences of admission of guilt; that the admission of guilt is made voluntarily; and that the admission of guilt is supported by the facts and circumstances of the case. After the Chamber is satisfied of these three facts, it then considers the admission of guilt "together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates."[877] After fulfilling this elaborate criteria, the Trial Chamber may convict the accused person of the crime. Because of this unique procedural requirement, plea negotiation at the ICC would differ from that of the domestic jurisdictions and that of the ICTY and ICTR[878]; therefore, the language of the proposed Article 65 *bis* is adapted to specifically cater to this difference.

In addition to the above, proposed Article 65 *bis* (1) (a), (b) and (c), *bis* provides that if an accused agrees to admit guilt pursuant to a discussion with the Prosecutor, the latter shall take one or more of the following actions: request the Trial Chamber to amend the charges accordingly; recommend to the Trial Chamber a specific sentence

[874] See discussions in part 6.3.1 below on how plea negotiation can help reduce the lengthy proceedings at the ICC.

[875] See Rules 62 and 62 *bis* of both the ICTY RPE and ICTR RPE.

[876] For a comparison of the practice at the ICC on the one hand, and with that of the ICTY and the ICTR as well as selected domestic jurisdictions, on the other hand, see Chapters 4 and 5 of this thesis respectively.

[877] Article 65 (2) of the RS.

[878] See discussion of plea negotiation in Select national jurisdictions and at the ICTY and ICTR in chapters four and five of this thesis, respectively.

or sentencing range; and, undertake not to oppose a request by the accused for a particular sentence or sentencing range. First, it is acknowledged that the proposed Article 65 *bis* (1) (a), regarding the amendment of charges, may result into some complication considering the already complex nature of the definition, scope of charges and amendment of charges at the ICC.[879] During the pre-trial stage of the proceedings, the Prosecutor may amend charges with the permission of the Pre-Trial Chamber. However, after the charges are confirmed, which is the period during which plea negotiation is proposed in this thesis, the Prosecutor is not authorised to amend charges; and technically neither is the Trial Chamber. The amendment of charges is not one of the mandates of Trial Chambers enumerated by Article 64 of the Rome Statute. However, there is a narrow, and controversial,[880] allowance under Regulation 55 of the Regulations of the Court which permits the Trial Chamber to amend the legal characterisation of the facts. Therefore, for the proposed Article 65 *bis* (1) (a) to fit properly within the legal framework of the Court, there would be need to amend Article 61 of the Rome Statute to directly authorise the Trial Chamber to amend charges, if it accepts a plea agreement between the Prosecutor and the Defence. The resolution of this issue requires further in-depth research and analysis on amendment of charges at the ICC which is beyond the scope of this thesis.

Secondly, reference is made to the proposed Article 65 *bis* (1) (b) and (c), which require the Prosecutor, pursuant to a plea negotiation with the defence, to recommend to the Trial Chamber a specific sentence or sentencing range, and, undertake not to oppose a request by the accused for a particular sentence or sentencing range. These provisions are based on the recognition that sentencing powers are only and entirely vested in the Trial Chamber. Upon conviction, the Trial Chamber is mandated to consider the appropriate sentence taking into consideration the evidence presented in the case and the submissions of the participants. For that reason, the proposed amendments provide that the Prosecutor may merely recommend a sentence or agree not to oppose the sentence recommendation of the defence. This provision is augmented by the proposed amendment to Rule 139 *bis* (7) which provides as follows:

[879] See discussion of this in part 3.2.1 of this dissertation.

[880] See discussion on complexity of Regulation 55 and the inconsistent jurisprudence of the Court on the same in part 3.2.1 of this dissertation.

(7) Upon conviction in accordance with sub-rule 6, the Trial Chamber shall then consider the sentence recommended in the agreement taking into account the views and concerns of the victims.

(a) If the Chamber is satisfied that the recommended sentence is just, the Chamber may impose a sentence within the recommended range.

(b) If the Chamber is of the opinion that the sentence is unjust or inappropriate for any other reason, the Chamber shall inform the Prosecutor, the Defence and the Legal Representative of Victims of the sentence which it considers just or appropriate and shall invite submissions from the participants.

(c) Having considered submissions from participants, the Chamber shall impose the sentence it considers just or appropriate and the matter shall be subject to appeal under Article 81 paragraph 2.

The above proposed provision has three aims: first, to retain the discretion of the Trial Chamber in matters sentencing; second, to authorise participants to make submissions on sentencing if the Chamber is not satisfied with the recommendation made pursuant to an agreement. Third, it authorises the parties to appeal the Trial Chamber's sentencing decision arising from a plea negotiation. This is important to ensure procedural fairness and the rights of the accused enshrined under Article 64 (3) of the Rome Statute.[881]

On a related note, the proposed Article 65 *bis* (2) provides that the Trial Chamber shall not be bound by any agreement specified in paragraph 1 above. Which gives the Chamber the general supervisory powers of the acts of the Prosecutor and defence in relation to plea negotiation. Therefore, after the Prosecutor and the defence enter an agreement, the Chamber can decide on whether to accept it or not. To aid the Chamber

[881] Article 64 (3) of the RS provides that:

"The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses."

in making this decision the proposed Rule 139 *bis* of the RPE provides some formal requirements which must be fulfilled for an agreement entered into between the Prosecutor and the defence in relation to admission of guilt (the agreement) to be considered valid. The proposed Rule 139 bis (1) provides that the agreement shall be in writing and shall indicate that the accused person was assisted by counsel of their own choosing during negotiation and has been informed of their fair trial rights. The proposed amendment provides for three fundamental rights that the accused must be informed of as a bare minimum and that is the right: to be presumed innocent until proven guilty beyond reasonable doubt; not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence; and to a public and fair hearing conducted impartially and in accordance with the minimum guarantees stipulated in Article 67.

Furthermore, it is proposed that the agreement would state that during negotiation the charges were explained to the accused and that the accused fully understands the nature and the consequences of an admission of guilt and state that the admission is made voluntarily after the accused person has had sufficient consultation with counsel. This is important for example because in *Kambanda*, the accused attempted to revoke a guilty plea *inter alia* on the ground that he had not properly understood the consequences of pleading guilty and had not been availed the opportunity to sufficiently consult with counsel.[882] The agreement would also state fully the charges brought by the Prosecutor and admitted by the accused, the factual basis of the admission of guilt and all other facts relevant to the agreement including the sentence recommendation. Lastly in this regard, it is proposed that the agreement be signed by both the Prosecutor, the accused person, and counsel for the accused person, and, if the agreement was entered into with the help of an interpreter, an inclusion of a certificate by the interpreter to the effect that they interpreted accurately.

Proposed Article 65 *bis* (3) provides that: If an agreement has been reached by the parties, the Trial Chamber shall require the disclosure of the agreement in open session or, on a showing of good cause, in closed session, at the time the accused enters an admission of guilt. This is to preserve the principle of publicity of proceedings

[882] See discussion of this case in part 5.3.2 of this thesis.

as enshrined in Article 65 (1) and to avoid the secrecy and lack of transparency that is sometimes associated with plea negotiation.[883]

Finally, Article 65 *bis* of the proposed amendment provides that in determining whether to accept an agreement concluded under paragraph 1, the Trial Chamber shall take into consideration the views and concerns of the victims. This provision is important because the victim participation regime at the ICC is the first one of its kind in international criminal tribunals, and despite the many challenges it faces, it is still considered as a step in the right direction.[884] Therefore, the thesis proposes that the Trial Chamber considers the views and concerns of victims before accepting a plea agreement.

The proposed Article 65 bis and Rule 139 *bis,* presented in full in Appendix A and B, contain detailed legal and procedural provisions to guide the Chamber in ensuring that an admission of guilt is valid and in deciding whether to accept a plea agreement or a recommended sentence. It also provides for the procedure to be followed in case the Trial Chamber rejects the admission of guilt altogether. This is to ensure that plea negotiation, is practised at the ICC in a manner which protects the rights of the accused and ensures the fairness of the proceedings.

6.5 Conclusion

This chapter sought to respond to the main question of this dissertation that is whether the ICC should implement a plea negotiation policy to mitigate some of the challenges it faces. This dissertation concludes that the ICC should implement a plea negotiation policy because: plea negotiation fits in the *sui generis* ICC's substantive and procedural framework; plea negotiation can be a useful tool to deal with some of the challenges facing the ICC; and the ICC has the advantage of being able to benefit from the wealth of law, policy and jurisprudence and lessons from national jurisdictions and *ad hoc* tribunals, some of which are discussed in this dissertation. It was however acknowledged that the current legal and procedural framework does not adequately

[883] See part 4.5 on the critique of plea negotiation.

[884] See part 3.4 of this dissertation for a discussion on challenges relating to the victim participation and reparation regime at the ICC.

provide for plea negotiation, therefore, amendments have been proposed in Appendices A and B, the salient features of which were discussed in this chapter. The next chapter, Chapter Seven, concludes the dissertation.

CHAPTER 7: CONCLUSION

The ICC was established with the consensus of a significant part of the international community and given the mandate of trying persons responsible for the most serious international crimes which shock the human conscience. The crimes prosecuted at the ICC (genocide, war crimes, crimes against humanity and aggression) are grave, and affect numerous victims both directly and indirectly. In addition to its retributive function, the Rome Statute system also has a reparative and transformative function and is also part of the broader corpus of transitional justice.[885] It is in this spirit that public proceedings at the ICC not only serve to hold accountable persons deemed to have the highest responsibility for international crimes, but also serve other purposes such as establishing a historical record of atrocities. Ideally, persons most responsible for these types of crimes ought to undergo public trials, get convicted and receive proportionate sentences, without any form of negotiation, bargains or concessions. Viewed through this lens, plea negotiation is a flawed practice because it involves concessions, which means that persons who are, by their own admission, guilty of international crimes do not always receive the punishment they deserve. The criticisms against plea negotiation both at the national and at the international level, discussed in the previous chapters, are legitimate. Similarly, the initial fears of the ICTY judges that the crimes at the *ad hoc* tribunals were too serious to be bargained with also had merit. Indeed, plea negotiation ought not to be part of an *ideal* international criminal justice system.

However, the ICC is facing legal, procedural and political challenges, some of which are similar to those which were faced by the *ad hoc* tribunals and which necessitated the introduction of a policy of plea negotiation. A similar trend can also be seen in national jurisdictions, for example, jurisdictions which were traditionally opposed to negotiated criminal justice solutions, like Germany, are increasingly introducing it in their criminal justice systems for its practical benefits. The ICC should therefore borrow from this practice and implement a policy of plea negotiation to mitigate some of the challenges facing the Court. As seen at the *ad hoc* tribunals, and national jurisdictions, plea negotiation can be a useful tool in increasing judicial economy, ensuring shorter and less expensive trials and increasing the conviction rates.

[885] Owiso (n 840) 505; Oyugi and Owiso (n 862) 249.

Admittedly, a conviction is not the only acceptable result of a criminal trial and acquittals are also proof of a fair and transparent criminal justice system. However, it is noteworthy that the two main modes of criminal liability at the ICC, individual criminal responsibility and command responsibility, are complex and difficult to establish as illustrated, for example, by the *Bemba* case. Mr Bemba was the president of the Movement for the Liberation of Congo (MLC) and the commander in chief of its armed wing. He was charged with crimes perpetrated by the MLC forces in Central African Republic (CAR) in 2002-2003. The Trial Chamber held that he was criminally liable for these crimes, as a commander of the MLC, convicted him and sentenced him to 18 years' imprisonment. However, the Appeals Chamber, citing a number of legal and factual errors, reversed the decision of the Trial Chamber and held that Mr Bemba could not be held criminally liable for the crimes committed by the said troops and subsequently acquitted him.[886]

It is an uncontentious fact that crimes were committed in CAR during the MLC operation in 2002-2003 and that the victims suffered violence and cruelty; indeed both the Trial Chamber and the Appeals Chamber recognized this fact.[887] The decision of the Appeals Chamber, acquitting Mr Bemba, may be understood by legal experts who are familiar with the concept of superior responsibility of commanders under Article 28 of the Rome Statute, but it is understandably a source of pain, disappointment and disillusionment to the victims who participated in the trial.[888] It is acknowledged that the role of an international tribunal is not to convict an accused at all costs, and an Appeals Chamber ought to reverse a conviction if there are legal and/or factual errors to justify such reversal. However, without convictions the ICC does not appear to be delivering on its mandate to prosecute and punish international criminals and to deter crime. It is common knowledge that crimes were committed in CAR by MLC soldiers, the Appeals

[886] *The Prosecutor v Jean Pierre Bemba Gombo* (Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute") ICC-01/05-01/08-3636-Red (8 June 2018) [194].

[887] See for example *The Prosecutor v Jean Pierre Bemba Gombo* (Separate opinion Judge Christine Van den Wyngaert and Judge Howard Morrison) ICC-01/05-01/08-3636-Anx2 (8 June 2018) [57].

[888] See for example the LRV submission on the opinions of the victims in *The Prosecutor v Jean Pierre Bemba Gombo* (Legal Representatives of Victims' joint submissions on the consequences of the Appeals Chamber's Judgment dated 8 June 2018 on the reparations proceedings) ICC-01/05-01/08-3649 (12 July 2018) [2].

Chamber has held that Mr Bemba was not criminally liable for said crimes, therefore the question remains who is liable? That person ought to have been prosecuted in order to deliver justice to the victims.

In instances like these, plea negotiation could be a necessary tool to help in gathering evidence and ensuring the conviction of persons responsible for such crimes while saving the Court's resources. If the ICC implements a plea negotiation policy the Prosecutor could, for example, charge officials of lower ranks in addition to those of higher ranks and if the former agree to plead guilty, they could give evidence against the latter. For example, in the CAR situation, the Prosecutor may have charged a combination of lower and high cadre MLC officials, and if the former agreed to plead guilty through plea negotiation, they could then give evidence against higher ranking MLC officials. In the Mali situation, for example, Mr Al Mahdi who pleaded guilty of war crimes as a result of a plea agreement is set to give evidence in the *Al Hassan* case which deals with war crimes arising from the same situation.[889] If this way of doing things is developed as a matter of policy, the ICC could better deliver on its mandate to try persons most responsible for international crimes by relying on the evidence of convicted persons.

Admittedly, even with a plea negotiation policy, it would be difficult for the ICC to determine which accused person would plead guilty, especially since the crimes under the jurisdiction of the ICC, by their very nature, are committed in a political context and often backed by ideological beliefs.[890] Besides, it would also be unethical for the Court to encourage defendants to plead guilty. Nevertheless, it can be argued that if the ICC puts in place a plea negotiation policy it would most likely lead to a rise in guilty pleas and thereby convictions as occurred at the ICTY.

The ICC must not wait to be forced by circumstances to implement a policy of plea negotiations like happened at the *ad hoc* tribunals. The ICC needs to take the initiative to consider all tools which might mitigate the challenges facing the Court and this thesis argues that plea negotiation is one such tool. In this regard, the ICC already has the

[889] 'ICC: Last Chance to de-Quarantine Justice for Mali' <https://www.justiceinfo.net/en/justiceinfo-comment-and-debate/opinion/45752-icc-last-chance-to-de-quarantine-justice-for-mali.html> accessed 26 October 2020.

[890] See discussion in part 5.5.2 above.

necessary statutory framework, by virtue of Article 65, which foresees agreements between the prosecution and defence to guilty pleas, amendment of charges and sentence agreements. Similarly, the ICC has successfully dealt with the *Al Mahdi* case where the Prosecutor and the defence entered into a plea agreement, the accused person admitted to crimes committed and the parties agreed on a sentence range to propose to the Chamber; the Chamber sentenced the accused within the proposed range and the case was wrapped up without much controversy. In addition, this thesis presents proposed amendments to the Rome Statute and the RPE which could make the legal framework of the ICC more adaptable to a policy of plea negotiation.[891] The ICC should, therefore, implement a plea negotiation policy because its pragmatic benefits are established by the practice in national jurisdictions and at the *ad hoc* tribunals.

[891] See part 6.3.4 as well as Appendices A and B of this thesis.

Appendix A

Text of draft provision on plea negotiation to be included in the Rome Statute

Article 65 *bis*

Plea Negotiation

1. At any time after the confirmation of charges by the Pre-Trial Chamber, the Prosecutor and defence may commence negotiation with the aim of concluding an agreement according to which, upon the accused making an admission of guilt, the Prosecutor shall take one or more of the following actions:

a) request the Trial Chamber to amend the charges accordingly;

b) recommend to the Trial Chamber a specific sentence or sentencing range;

c) undertake not oppose a request by the accused for a particular sentence or sentencing range.

2. The Trial Chamber shall not be bound by any agreement specified in paragraph 1 above.

3. If an agreement has been reached by the parties, the Trial Chamber shall require the disclosure of the agreement in open session or, on a showing of good cause, in closed session, at the time the accused enters an admission of guilt in accordance with Article 65 paragraph 1.

4. In determining whether to accept an agreement concluded under paragraph 1 the Trial Chamber shall be guided by Rule 139 *bis* and shall take into consideration the views and concerns of the victims.

Appendix B

Text of draft Rule on Plea Negotiation to be included in the RPE

Rule 139 *bis*

Agreements under Article 65 *bis* paragraph 1

(1) An agreement contemplated in Article 65 *bis* shall be in writing and shall at least:

(a) State that the accused, before entering into the agreement, was represented by counsel of the accused's choosing and has been informed of their rights:

(i) to be presumed innocent until proved guilty beyond reasonable doubt;
(ii) not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence; and
(iii) to a public and fair hearing conducted impartially and in accordance with the minimum guarantees stipulated in Article 67.

(b) State that the charges have been explained to the accused in a language the accused fully understands and the accused understands the nature of the charges and consequences of the admission of guilt;

(c) State that the admission is voluntarily made by the accused after sufficient consultation with defence counsel;

(d) State fully the charges brought by the Prosecutor and admitted by the accused, the factual basis of the admission of guilt and all other facts relevant to the agreement including the sentence recommendation.

(e) Be signed by the Prosecutor, the accused and their legal representative; and

(f) If the accused has negotiated with the Prosecutor through an interpreter, contain a certificate by the interpreter to the effect that they interpreted accurately during the negotiations and in respect of the contents of the agreement.

(2) (a) As soon as an agreement is entered in conformity with sub-rule 1, the Prosecutor shall inform the Trial Chamber that such an agreement has been entered into and the Trial Chamber shall then-

(i) require the defence to confirm that such an agreement has been entered into; and
(ii) satisfy itself that the requirements of sub-rule 1 have been complied with.

(b) If the Trial Chamber is not satisfied that the agreement complies with the requirements of sub-rule 1 the Trial Chamber shall-

(i) inform the Prosecutor and the defence of the reasons for non-compliance; and
(ii) afford the Prosecutor and the defence the opportunity to comply with the requirements concerned.

(3) If the Trial Chamber is satisfied that the agreement complies with the requirements of sub-rule 1, the Trial Chamber shall order the disclosure of the agreement in open session or, on a showing of good cause, in closed session, at the time the accused enters an admission of guilt.

(4) (a) After the contents of the agreement have been disclosed, the Trial Chamber shall question the accused to ascertain whether:

(i) they confirm the terms of the agreement and the admissions made by them in the agreement;
(ii) with reference to the alleged facts of the case, they admit the allegations in the charge to which they have admitted guilt;

(iii) the agreement was entered into freely and voluntarily in their sound and sober senses and without having been unduly influenced; and
(iv) they fully understand the nature of the charges and consequences of the admission of guilt

(b) After an inquiry has been conducted in terms of sub-rule 4, the Trial Chamber shall record a plea of not guilty and inform the Prosecutor and the defence of the reasons therefore if:

(i) the Chamber is not satisfied that the accused is guilty of the offence in respect of which the agreement was entered into; or
(ii) it appears to the Chamber that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge; or
(iii)for any other reason, the Chamber is of the opinion that the admission of guilt by the accused should not stand.

(c) If the Chamber has recorded a plea of not guilty, it shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued under the ordinary trial procedures in accordance with Article 65 paragraph 3 and may remit the case to another Trial Chamber.

(5) If in the interest of justice and in the interest of the victims the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required the Trial Chamber may request the Prosecutor to present additional evidence, or order that the trial be continued under the ordinary trial procedures in accordance with Article 65 paragraph 4, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.

(6) (a) If the Trial Chamber is satisfied that the accused admits the allegations in the charge, it shall consider the admission of guilt, together with any additional

evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.

(7) Upon conviction in accordance with sub-rule 6, the Trial Chamber shall then consider the sentence recommended in the agreement taking into account the views and concerns of the victims.

(d) If the Chamber is satisfied that the recommended sentence is just, the Chamber may impose a sentence within the recommended range.

(e) If the Chamber is of the opinion that the sentence is unjust or inappropriate for any reason, the Chamber shall inform the Prosecutor, the defence and the Legal Representative of victims of the sentence which it considers just or appropriate and shall invite submissions from the participants.

(f) Having considered submissions from participants, the Chamber shall impose the sentence it considers just or appropriate and the matter shall be subject to appeal under Article 81 paragraph 2.

BIBLIOGRAPHY AND TABLE OF CASES

Books and Book Chapters

Behrens H-J, 'The Trial Proceedings' in Roy Lee (ed), *The International Criminal Court: The Making of the Rome Statute--Issues, Negotiations, and Results* (1 edition, Springer 1999)

Boister N and Cryer R, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford University Press 2008)

Carter LE and Pocar F (eds), *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems* (Edward Elgar 2013)

Del Ponte C, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity: A Memoir* (Other Press 2009)

Du Plessis M, Maluwa T and O'Reilly A, 'Africa and the International Criminal Court' (Chatham House 2013)

Du Plessis, *The International Criminal Court That Africa Wants* (Institute for Security Studies 2010)

Fernandez de Gurmendi S, 'The Negotiating Process' in Roy Lee (ed), *The International Criminal Court: The Making of the Rome Statute--Issues, Negotiations, and Results* (1 edition, Springer 1999)

Friman H, 'Cooperation with the International Criminal Court: Some Thoughts on Improvements under the Current Regime' in Federica Gioia and Mauro Politi (eds), *The International Criminal Court and National Jurisdictions* (Ashgate Publishing, Ltd 2008)

Funk TM, *Victims' Rights and Advocacy at the International Criminal Court* (Oxford University Press 2015)

Guariglia F, 'Investigation and Prosecution' in Roy Lee (ed), *The International Criminal Court: The Making of the Rome Statute--Issues, Negotiations, and Results* (1 edition, Springer 1999)

Hoile D, *Justice Denied: The Reality of the International Criminal Court* (The Africa Research Centre 2014)

Lee R, 'The Rome Conference and Its Contribution to International Law' in Roy Lee (ed), *The International Criminal Court: the making of the Rome Statute: issues, negotiations and results* (Martinus Nijhoff Publishers 1999)

Mackenzie R and others, *Selecting International Judges: Principle, Process, and Politics* (OUP Oxford 2010)

McDougall C, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge University Press 2013)

Meron T, *The Making of International Criminal Justice: A View from the Bench: Selected Speeches* (OUP Oxford 2011)

Mettraux G, *Perspectives on the Nuremberg Trial* (Oxford University Press 2008)

Morris V and Scharf M, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis* (Hotei Publishing 1995)

Newman DJ, *Conviction: The Determination of Guilt or Innocence without Trial* (Little, Brown 1966)

Ratner SR and Abrams JS, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford University Press 2001)

Sluiter G and others, *International Criminal Procedure: Principles and Rules* (OUP Oxford 2013)

Temple-Raston D, *Justice on the Grass: Three Rwandan Journalists, Their Trial for War Crimes, and a Nation's Quest for Redemption* (Simon and Schuster 2005)

Weissbrodt D, Fitzpatrick J and Newman FC, *International Human Rights: Law, Policy, and Process* (LexisNexis 2009)

Werle G, *Principles of International Criminal Law: 2nd Edition* (TMC Asser Press 2009)

Zidar A and Bekou O (eds), *Contemporary Challenges for the International Criminal Court* (British Institute of International and Comparative Law 2014)

Journal Articles

Akhavan P, 'The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court. (Developments at the International Criminal Court)' (2005) 99 American Journal of International Law 403

Alschuler A, 'Plea Bargaining and Its History' (1979) 79 Colombia Law Review 1

Alschuler AW, 'The Prosecutor's Role in Plea Bargaining' (1968) 36 The University of Chicago Law Review 50

——, 'The Changing Plea Bargaining Debate' (1981) 69 California Law Review 652

Aluoch J, 'Ten Years of Trial Proceedings at the International Criminal Court' (2013) 12 Washington University Global Studies Law Review 433

Banks A, 'Carla Del Ponte: Her Retrospective of Four Years in The Hague' (2004) 6 International Law Forum du Droit International 37

Barria L and Roper S, 'How Effective Are International Criminal Tribunals? An Analysis of the ICTY and the ICTR' (2005) 9 The International Journal of Human Rights 349

Bassiouni MC, 'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court' (1997) 10 Harvard Human Rights Journal 11

——, 'Negotiating the Treaty of Rome on the Establishment of an International Criminal Court' (1999) 32 Cornell International Law Journal 443

Bekker PM, 'Plea Bargaining in the United States of America and South Africa' (1996) 29 Comparative and International Law Journal of Southern Africa 168

Bennun ME, 'Negotiated Pleas: Policy and Purposes' (2007) 20 South African Journal of Criminal Justice 17

Bensouda F, 'The ICC Statute - An Insider's Perspective on a Sui Generis System for Global Justice' (2010) 36 North Carolina Journal of International Law and Commercial Regulation 277

——, 'Statement to the United Nations Security Council on the Situation in Darfur, Pursuant to UNSCR 1593 (2005)' (International Criminal Court 2014) <https://www.icc-cpi.int/iccdocs/otp/stmt-20threport-darfur.pdf>

Bertodano S de, 'Judicial Independence in the International Criminal Court' (2002) 15 Leiden Journal of International Law 409

Branch A, 'Uganda's Civil War and the Politics of ICC Intervention' 21 Ethics & International Affairs 179

Brook CA and others, 'A Comparative Look at Plea Bargaining in Australia, Canada, England, New Zealand, and the United States' (2016) 57 William and Mary Law Review 1147

Carroll CM, 'An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994' (2000) 18 Boston University International Law Journal 163

Christensen R, 'Getting to Peace by Reconciling Notions of Justice: The Importance of Considering Discrepancies between Civil and Common Legal Systems in the Formation of the International Criminal Court' (2001) 6 UCLA Journal of International Law and Foreign Affairs 391

Christie GC, 'Some Key Jurisprudential Issues of the Twenty-First Century Essay' (2000) 8 Tulane Journal of International and Comparative Law 217

Clark JN, 'Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation' (2009) 20 European Journal of International Law 415

——, ‘Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation’ (2009) 20 European Journal of International Law 415

——, ‘The ICTY and the Challenges of Reconciliation in the Former Yugoslavia’ (*E-International Relations*) <https://www.e-ir.info/2012/01/23/the-icty-and-the-challenges-of-reconciliation-in-the-former-yugoslavia/> accessed 10 August 2018

Combs NA, ‘Copping a Plea to Genocide: The Plea Bargaining of International Crimes’ (2002) 151 University of Pennsylvania Law Review 1

——, ‘Prosecutor v. Plavšić. Case No. IT-00-39&40/1-S’ (2003) 97 The American Journal of International Law 929

——, ‘Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentence Discounts’ (2006) 59 Vanderbilt Law Review 69

Cook JA, ‘Plea Bargaining at The Hague’ (2005) 30 The Yale Journal of International Law 473

Damaska M, ‘Negotiated Justice in International Criminal Courts Symposium on Guilty Plea - Part I: The Theoretical Background’ (2004) 2 Journal of International Criminal Justice 1018

Du Toit P and Ferreira G, ‘Reasons for Prosecutorial Decisions’ (2016) 18 Potchefstroom Electronic Law Journal 1506

Easterbrook FH, ‘Plea Bargaining as Compromise’ (1992) 101 The Yale Law Journal 1969

Eberle EJ, ‘The Method and Role of Comparative Law’ (2008) 8 Washington University Global Studies Law Review 451

Feeley MM, ‘Legal Complexity and the Transformation of the Criminal Process: The Origins of Plea Bargaining International Conference on Rights of the Accused, Crime Control and Protection of Victims: II. Plea bargaining’ (1997) 31 Israel Law Review 183

Fisher G, ‘Plea Bargaining’s Triumph’ (2000) 109 The Yale Law Journal 857

Ford S, ‘Complexity and Efficiency at International Criminal Courts’ (2014) 29 Emory International Law Review 2

Frase RS, ‘Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find out, and Why Should We Care?’ (1990) 78 California Law Review 539

Gallant KS, ‘The Role and Powers of Defense Counsel in the Rome Statute of the International Criminal Court’ (2000) 34 The International Lawyer 21

Garapon A, ‘Three Challenges for International Criminal Justice’ (2004) 2 Journal of International Criminal Justice 716

Garoupa N and Stephen FH, 'Why Plea bargaining Fails to Achieve Results in So Many Criminal Justice Systems: A New Framework for Assessment' (2008) 15 Maastricht Journal of European and Comparative Law 323

Goodliffe J and Hawkins D, 'A Funny Thing Happened on the Way to Rome: Explaining International Criminal Court Negotiations' (2009) 71 The Journal of Politics 977

Groome DM, 'Re-Evaluating the Theoretical Basis and Methodology of International Criminal Trials' (2006) 25 Penn State International Law Review 791

Herrmann J, 'Bargaining Justice - A Bargain for German Criminal Justice Essay' (1991) 53 University of Pittsburgh Law Review 755

Keedy ER, 'The Preliminary Investigation of Crime in France' (1940) 88 University of Pennsylvania Law Review and American Law Register 385

Keïta X-J, 'Disclosure of Evidence in the Law and Practice of the ICC' (2016) 16 International Criminal Law Review 1018

Kemp G, 'Alternative Measures to Reduce Trial Cases, Private Autonomy and "Public Interest": Some Observations with Specific Reference to Plea Bargaining and Economic Crimes' (2014) 25 Stellenbosch Law Review 425

Kress C, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise' (2003) 1 Journal of International Criminal Justice 603

——, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise Symposium: On Some of the Legal Problems the ICC Is Currently Facing' (2003) 1 Journal of International Criminal Justice 603

——, 'The Procedural Texts of the International Criminal Court' (2007) 5 Journal of International Criminal Justice 537

Langbein J, 'Understanding the Short History of Plea Bargaining' (1979)

____, 'Land without Plea Bargaining: How the Germans Do It' (1979) 78 Michigan Law Review 204

____, 'Torture and Plea Bargaining' The University of Chicago Law Review 20

Langer M, 'From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and The Americanization Thesis in Criminal Procedure' (2004) 45 Harvard International Law Journal 1

Ma Y, 'Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective' (2002) 12 International Criminal Justice Review 22

Maviş V, 'Why Should the International Criminal Court Adopt Plea Bargaining' (2014) 5 Inonu University Faculty of Law journal 459

McCleery K, ‘Guilty Pleas and Plea Bargaining at the Ad Hoc Tribunals: Lessons from Civil Law Systems’ (2016) 14 Journal of International Criminal Justice 1099

McDonald GK, ‘Problems, Obstacles and Achievements of the ICTY’ (2004) 2 Journal of International Criminal Justice 558

McLaughlin CT, ‘The Sui Generis Trial Proceedings of the International Criminal Court’ (2007) 6 The Law and Practice of International Courts and Tribunals 343

Mundis DA, ‘The Legal Character and Status of the Rules of Procedure and Evidence of the Ad Hoc International Criminal Tribunals’ (2001) 1 International Criminal Law Review 191

Newton MA, ‘How the International Criminal Court Threatens Treaty Norms’ (2016) 49 Vanderbilt Journal of Transnational Law 371

Nouwen SMH and Werner WG, ‘Doing Justice to the Political: The International Criminal Court in Uganda and Sudan’ (2010) 21 European Journal of International Law 941

Owiso O, ‘The International Criminal Court and Reparations: Judicial Innovation or Judicialisation of a Political Process?’ (2019) 19 International Criminal Law Review 505

Pati R, ‘ICC and the Case of Sudan’s Omar Al Bashir: Is Plea bargaining a Valid Option,’ (2008) 15 University of California Davis Journal of International Law and Policy 265

Pejovic C, ‘Civil Law and Common Law: Two Different Paths Leading to the Same Goal’ (2001) 32 Victoria University of Wellington Law Review 817

Petrig A, ‘Negotiated Justice and the Goals of International Criminal Tribunals’ (2008) 8 Chicago-Kent Journal of International and Comparative Law 1

Rauxloh RE, ‘Negotiated History: The Historical Record in International Criminal Law and Plea Bargaining’ (2010) 10 International Criminal Law Review 739

____,‘Plea Bargaining - A Necessary Tool for the International Criminal Prosecutor’ (2011) 94 Judicature 178

Rosenne S, ‘Poor Drafting and Imperfect Organization: Flaws to Overcome in the Rome Statute 40th Anniversary Conference Panel’ (2000) 41 Virginia Journal of International Law 164

Schabas WA, ‘State Policy as an Element of International Crimes’ (2007) 98 Journal of Criminal Law and Criminology 953

Scharf M, ‘Trading Justice for Efficiency - Plea bargaining and International Tribunals’ (2004) 2 Journal of International Criminal Justice 1070

____, ‘Trading Justice for Efficiency - Plea bargaining and International Tribunals Symposium on Guilty Plea - Part I: The Theoretical Background’ (2004) 2 Journal of International Criminal Justice 1070

Stempel JW, ‘A More Complete Look at Complexity’ (1998) 40 Arizona Law Review 781

Steyn E, ‘Plea bargaining in South Africa: Current Concerns and Future Prospects’ (2007) 20 South Africa Journal of Criminal Justice 206

Strang RR, ‘Plea Bargaining Cooperation Agreements and Immunity Orders’ 115th International Training Course visiting Experts Papers 30

Subotić J, ‘The Cruelty of False Remorse: Biljana Plavšić at The Hague’ (2012) 36 Southeastern Europe 39

Tidmarsh J, ‘Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power’ (1992) 60 The George Washington Law Review 1683

Tochilovsky V, ‘Proceedings in the International Criminal Court: Some Lessons to Learn from ICTY Experience’ (2002) 10 European Journal of Crime, Criminal Law and Criminal Justice 268

——, ‘Globalizing Criminal Justice: Challenges for the International Criminal Court’ (2003) 9 Global Governance 291

Tomuschat C, ‘The Legacy of Nuremberg’ (2006) 4 Journal of International Criminal Justice 830

Turner JI, ‘Judicial Participation in Plea Negotiations: A Comparative View’ (2006) 54 The American Journal of Comparative Law 199

Van den Wyngaert C, ‘Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge - Presented by the Frederick K. Cox International Law Center’ (2011) 44 Case Western Reserve Journal of International Law 475

Washburn J, ‘The Negotiation of the Rome Statute for the International Criminal Court and International Law making in the 21st Century’ (1999) 11 Pace International Law Review 361

Weigend T and Turner JI, ‘The Constitutionality of Negotiated Criminal Judgments in Germany’ (2014) 15 German Law Journal 81

Zacklin R, ‘Failings of Ad Hoc International Tribunals, The’ (2004) 2 Journal of International Criminal Justice 541

Treaties and Regional Instruments

‘Agreement Between the United Nations and the Government of Sierra Leone On the Establishment of a Special Court for Sierra Leone’ <http://www.rscsl.org/Documents/scsl-agreement.pdf> accessed 31 January 2018

‘Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945’ (8 August 1945) <http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf> accessed 31 January 2018

‘Law on Specialist Chambers and the Specialist Prosecutor’s Office’ <http://www.kuvendikosoves.org/common/docs/ligjet/05-L-053%20a.pdf> accessed 31 January 2018

‘Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea of 27 October 2004’ <https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf> accessed 31 January 2018

African Union documents

‘African Union, (AU Assembly), Decision on International Jurisdiction, Justice and The International Criminal Court (ICC)1 - Doc. Assembly/AU/13(XXI) (Addis Ababa 26 - 27 May 2013) Assembly/AU/Dec.482(XXI)’ <https://au.int/sites/default/files/decisions/9654-assembly_au_dec_474-489_xxi_e.pdf> accessed 21 February 2018

‘African Union, (AU Assembly), “Decision on the Appointment of Members of the African Commission on Human and Peoples” Rights’(Sirte 1-3 July 2009)Doc.EX.CL/533(XV)’ <https://au.int/sites/default/files/decisions/9560-assembly_en_1_3_july_2009_auc_thirteenth_ordinary_session_decisions_declarations_message_congratulations_motion_0.pdf> accessed 21 February 2018

‘African Union, (AU Assembly), “Decision on the International Criminal Court (ICC)” (Addis-Ababa January 2017) Doc. EX.CL/1006(XXX)’ <https://au.int/sites/default/files/decisions/32520-sc19553_e_original_-_assembly_decisions_621-641_-_xxviii.pdf> accessed 20 February 2018

‘African Union, (AU Assembly) “Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)” (Sirte 1-3 July 2009) Doc. Assembly/AU/13(XIII).’

‘African Union, (AU Assembly), “Withdrawal Strategy Draft 2” January 2017’ <https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf> accessed 20 February 2018

United Nations Documents

'A/RES/3/260 - Resolution Adopted by the General Assembly 260 (III) Prevention and Punishment of the Crime of Genocide' <http://www.un-documents.net/a3r260.htm> accessed 24 October 2017

'Assessments and Report of Judge Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, Provided to the Security Council Pursuant to Paragraph 6 of Security Council Resolution 1534 (2004) Annex to UN Doc S/2004/420 (24 May 2004)'

'Completion Strategy of the International Criminal Tribunal for Rwanda Annex to UN Doc S/2004/341 (3 May 2004)'

'Final Act of the United Nations Diplomatic Conference Of Plenipotentiaries On The Establishment Of An International Criminal Court' <http://www.un.org/law/icc/index.html> accessed 24 October 2017

'Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994) Annex to UN Doc S/1994/1405 (9 December 1994)'

UN General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power : Resolution / Adopted by the General Assembly, 29 November 1985, A/RES/40/34' http://www.un.org/documents/ga/res/40/a40r034.htm

'UNSC "Identical Letters Dated 7 September 2000 from the Secretary General Addressed to the President of the General Assembly and the President of the Security Council" UN Doc S/2000/865'

'UNSC "Letter Dated 17 June 2002 from the Secretary General Addressed to the President of the Security Council" UN Doc S/2002/678'

'UNSC Resolution 1503 (28 August 2003) UN Doc S/RES/1503'

'Updated Security Council Must Reflect Changing Global Reality, Member States Say, as General Assembly Debates Ways to Advance Progress on Reform | Meetings Coverage and Press Releases' <https://www.un.org/press/en/2016/ga11854.doc.htm> accessed 6 February 2018

Dissertation and Theses

Kerscher M, 'Plea Bargaining in South Africa and in Germany' (LLM Thesis, Stellenbosch University 2013)

Oyugi P, 'Head of State Immunity under the Rome Statute of the International Criminal Court: An Analysis of the Contemporary Legal Issues and the African Union's

Response to the Prosecution of African Heads of State' (LLM Thesis, Rhodes University 2015)

Statutes

Kenya

The Constitution of Kenya 2010

Office of the Director of Public Prosecutions Act 2013

South Africa

The Constitution of the Republic of South Africa 1996

Criminal Procedure Act 51 of 1977

ICTY

UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993

International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and evidence (as amended on 8 July 2015), Adopted on 11 February 1994

ICTR

UN Security Council, Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), 8 November 1994

International Criminal Tribunal for Rwanda, Rules of Procedure and evidence (as amended on 13 May 2015), Adopted on n 29 June 1995

ICC

Rome Statute of the International Criminal Court

Rules of Procedure and Evidence

Regulations of the Court

Regulations of the Registry

Table of cases

South Africa

Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening) (83145/2016) [2017] ZAGPPHC 53; 2017 (3) SA 212 (GP); [2017] 2 All SA 123 (GP); 2017 (1) SACR 623 (GP) (22 February 2017)

Kenya

Adan Inshair Hassan v Republic (1973) EA 445

The International Criminal Court (ICC)

The Prosecutor v Laurent Gbagbo and Charles Blé Goudé (Dissenting opinion of judge Cuno Tarfusser) ICC-02/11-01/15-846-Anx (10 March 2017)

The Prosecutor v Thomas Lubanga Dyilo (Decision adjourning the evidence in the case and consideration of Regulation 55) ICC-01/04-01/06-2143 (2 October 2009)

The Prosecutor v Thomas Lubanga Dyilo (Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court) ICC-01/04-01/06-2049 (14 July 2009)

The Prosecutor v Thomas Lubanga Dyilo (Defence Application Seeking a Permanent Stay of the Proceedings) ICC-01/04-01/06--2657-tENG-Red (10 December 2010)

The Prosecutor v William Ruto & Joshua Arap Sang (Decision on Defence Applications for Judgments of Acquittal) ICC-01/09-01/11-2027-Red (5 March 2016)

Omar Serushago v The Prosecutor (Reasons for Judgment) ICTR-98-39-A (6 April 2000)

The Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, ICC-02/05-03/09

The Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus (Order on translation of witness statements) ICC-02/05-03/09-199 (16 August 2011)

The Prosecutor v Ahmad Al Faqi Al Mahdi (Sentence and Judgment) ICC-01/12-01/15 (27 December 2016)

The Prosecutor v Bemba Gombo (Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court) ICC-01/05-01/08-2324 (21 September 2012)

The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Decision on the implementation of regulation 55 of the Regulations of the Court and severing the

charges against the accused persons) (dissenting opinion of Judge Van den Wyngaert) ICC-01/04-01/07-3319-tENG/FRA (21 November 2012)

The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons) ICC-01/04-01/07 (21 November 2012)

The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons) ICC-01/04-01/07-3319-tENG/FRA (21 November 2012)

The Prosecutor v Germain Katanga (Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled 'Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons) Case No ICC-01/04-01/07-3363 (21 March 2013)

The Prosecutor v Germain Katanga (Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled 'Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons) (Dissenting opinion of Judge Cuno Tarfusser) ICC-01/04-01/07-3363 (21 March 2013)

The Prosecutor v Germain Katanga (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/07-3436-tENG (7 March 2014)

The Prosecutor v Jean Pierre Bemba Gombo (Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute") ICC-01/05-01/08-3636-Red (8 June 2018)

The Prosecutor v Jean Pierre Bemba Gombo (Legal Representatives of Victims' joint submissions on the consequences of the Appeals Chamber's Judgment dated 8 June 2018 on the reparations proceedings) ICC-01/05-01/08-3649 (12 July 2018)

The Prosecutor v Jean Pierre Bemba Gombo (Public redacted version of "Decision on the tenth and seventeenth transmissions of applications by victims to participate in the proceedings,") ICC-01/05-01/08-2247-Red (19 July 2011)

The Prosecutor v Jean Pierre Bemba Gombo (Separate opinion Judge Christine Van den Wyngaert and Judge Howard Morrison) ICC-01/05-01/08-3636-Anx2 (8 June 2018)

The Prosecutor v Jean-Pierre Bemba Gombo (Decision on the Defence request for an extension of time to file additional observations for reparations) ICC-01/05-01/08 (08 November 2017)

The Prosecutor v Jean-Pierre Bemba Gombo (Directions on the conduct of the proceedings) ICC-01/05-01/08-1023 (19 November 2010)

The Prosecutor v Jean-Pierre Bemba Gombo (Final Decision on the Reparations Proceedings) ICC-01/05-01/08-3653 (3 August 2018)

The Prosecutor v Laurent Gbagbo and Charles Blé Goudé (Annex A to Decision adopting amended and supplemented directions on the conduct of the proceedings) ICC-02/11-01/15-498-AnxA (4 May 2016)

The Prosecutor v Laurent Gbagbo and Charles Blé Goudé (Decision Giving Notice Pursuant to Regulation 55(2) of the Regulations of the Court) ICC-02/11-01/15-185 (19 August 2015)

The Prosecutor v Laurent Gbagbo and Charles Blé Goudé (Decision on Prosecution requests to join the cases of The Prosecutor v Laurent Gbagbo and The Prosecutor v Charles Blé Goudé and related matters) ICC-02/11-01/15 (11 March 2015)

The Prosecutor v Lubanga Dyilo (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06-2842 (14 March 2012)

The Prosecutor V Omar Hassan Ahmad Al Bashir (Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad) ICC-02/05-01/09-109 (27 August 2010)

The Prosecutor V Omar Hassan Ahmad Al Bashir (Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir) ICC-02/05-01/09-151 (26 March 2013)

The Prosecutor V Omar Hassan Ahmad Al Bashir (Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-140 (13 December 2011)

The Prosecutor v Omar Hassan Ahmad Al Bashir (Decision Requesting Observations on Omar Al-Bashir's Visit to the Republic of Chad) ICC-02/05-01/09-147 (22 February 2013)

The Prosecutor v Omar Hassan Ahmad Al Bashir (Decision under Article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir) ICC-02/05-01/09 (11 December 2017)

The Prosecutor v Omar Hassan Ahmad Al Bashir (Decision under Article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir) ICC-02/05-01/09 (6 July 2017)

The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi (Decision on the Request for Disqualification of the Prosecutor) ICC-01/11-01/11-175 (12 June 2012)

The Prosecutor v Thomas Lubanga Dyilo (Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the status conference on 10 June 2008) ICC-01/04-01/06 (13 June 2008)

The Prosecutor v Thomas Lubanga Dyilo (Decision on victims' participation) ICC-01/04-01/06-1119 (18 January 2008)

The Prosecutor v Thomas Lubanga Dyilo (Information regarding Collective Reparations) ICC-01/04-01/06 (13 February 2017)

The Prosecutor v Thomas Lubanga Dyilo (Judgment on Appeal) ICC-01/04-01/06-1432 (11 July 2008)

The Prosecutor v Thomas Lubanga Dyilo (Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008') ICC-01/04-01/06-1486 (21 October 2008)

The Prosecutor v Thomas Lubanga Dyilo (Order for reparations) ICC-01/04-01/06-3129-AnxA (3 March 2015)

The Prosecutor v Thomas Lubanga Dyilo (Prosecution's Response to the Defence's « Requête de la Défense aux fins d'arrêt définitif des procédures ») ICC-01/04-01/06-2678-Red (31 January 2011)

The Prosecutor v Thomas Lubanga Dyilo (Redacted Decision on the Public 'Defence Application Proceedings') ICC-01/04-01/06-2690-Red2 (7 March 2011)

The Prosecutor v Uhuru Muigai Kenyatta (Decision on Defence Application Pursuant to Article 64(4) and Related Requests) ICC-01/09-02/11-728 (26 April 2013)

The Prosecutor v Uhuru Muigai Kenyatta (Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial) ICC-01/09-02/11 (18 October 2013)

The Prosecutor v Uhuru Muigai Kenyatta (Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute) ICC-01/09-02/11-982 (3 December 2014)

The Prosecutor v Uhuru Muigai Kenyatta (Decision on the Prosecution's Motion for Reconsideration of the Decision Excusing Mr Kenyatta from Continuous Presence at Trial) ICC-01/09-02/11 (26 November 2013)

The Prosecutor v Uhuru Muigai Kenyatta (Decision on the withdrawal of charges against Mr Kenyatta) ICC-01/09-02/11-1005 (13 March 2015)

The Prosecutor v William Ruto and Joshua Arap Sang (Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial) ICC-01/09/01/11 (18 June 2013)

*The Prosecutor v William Ruto and Joshua Arap Sang (*Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber V(a) of 18 June 2013 entitled "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial) ICC-01/09/01/11 OA 5 (25 October 2013)

International Criminal Tribunal for the Former Yugoslavia (ICTY)

The Prosecutor v Biljana Plavšić (Decision of the President on the Application for Pardon or Commutation of Sentence of Mrs Biljana Plavšić) IT-OO-39 & 40/I-ES (14 September 2009)

The Prosecutor v Biljana Plavšić (Factual Basis for Plea of Guilt) IT-00-39&40-PT (30 September 2002)

The Prosecutor v Biljana Plavšić (Plea Agreement) IT-00-39&40-PT (30 September 2002)

The Prosecutor v Biljana Plavšić (Sentencing Judgment) IT-00-39&40/1-S (27 February 2003)

The Prosecutor v Darco Mrda (Decision of the President on the early release of Darco Mrda) IT-02-59-ES (18 December 2013)

The Prosecutor v Dragan Nikolić (Judgment on Sentencing Appeal) IT-94-2-A (4 February 2005)

The Prosecutor v Dragan Obrenovic (Decision of the President on the early release of Dragan Obrenovic) IT-02-60/2-ES (21 September 2011)

The Prosecutor v Drazen (Appeal Judgment Separate and Dissenting Opinion of Judge Stephen) IT-96-22-T (7 October 1997)

The Prosecutor v Drazen Erdemović (Appeal Judgment) IT-96-22-A (7 October 1997)

The Prosecutor v Drazen Erdemović (Appeal Judgment Joint Separate Opinion of Judge McDonald and Judge Vohrah) IT-96-22-T (7 October 1997)

The Prosecutor v Drazen Erdemović (Appeal Judgment Separate and Dissenting Opinion of Judge Cassese) IT-96-22-T (7 October 1997)

The Prosecutor v Drazen Erdemović (Appeal Judgment Separate and Dissenting Opinion of Judge Li) IT-96-22-T (7 October 1997)

The Prosecutor v Drazen Erdemović (Sentencing judgment) IT-96-22-T (29 November 1996)

The Prosecutor v Drazen Erdemović (Sentencing Judgment) IT-96-22-Tbis (5 March 1998)

The Prosecutor v Duško Sikirica, Damir Došen and Dragan Kolundžija (Sentencing judgment) IT-95-8-S (13 November 2001)

The Prosecutor v Goran Jelisić (Judgment) IT-95- 10-A (5 July 2001)

The Prosecutor v Goran Jelisić (Judgment) IT-95-10-A (5 July 2001)

The Prosecutor v Goran Jelisić (Judgment) IT-95-10-T (14 December 1999)

The Prosecutor v Milan Babić (Plea agreement) IT-03-72-I (22 January 2004)

The Prosecutor v Milan Babić (Sentencing Judgment) IT-03-72-S (29 June 2004)

The Prosecutor v Milan Simić (Sentencing Judgment) IT-95-9/2-S (17 October 2002)

The Prosecutor v Milosevic (Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief) IT-02-54-AR734 (21 October 2003)

The Prosecutor v Miodrag Jokić (Judgment on Sentencing Appeal) IT-01-42/1-A (30 August 2005)

The Prosecutor v Miroslav Bralo (Factual Basis) IT-95-17-PT (18 July 2005)

The Prosecutor v Miroslav Bralo (Plea agreement) IT-95-17-PT (18 July 2005)

The Prosecutor v Momir Nikolić (Judgment on Sentencing Appeal) IT-02-60/1-A (8 March 2006)

The Prosecutor v Momir Nikolić (Sentencing Judgment) IT-02-60/1-S (2 December 2003)

The Prosecutor v Predrag Banovic (Annex 1 To Plea Agreement Factual Basis of Plea Agreement) IT-02-65-PT (2 June 2003)

The Prosecutor v Predrag Banovic (Plea Agreement) IT-02-65-PT (2 June 2003)

The Prosecutor v Predrag Banović (Sentencing Judgment) IT-02-65/1-S (28 October 2003)

The Prosecutor v Ranko Češić (Factual Basis) IT-95-10/1-PT (October 2003)

The Prosecutor v Ranko Češić (Sentencing Judgment) IT-95-10/1-S (11 March 2004)

The Prosecutor v Ranko Češić (Plea agreement) IT-95-10/1-PT (October 2003)

The Prosecutor v Timohir Blaškić (Judgment) IT-95-14-T (3 March 2000)

The Prosecutor v Todorović (Sentencing Judgment) IT-95-9/1 (31 July 2001)

International Criminal Tribunal for Rwanda (ICTR)

The Prosecutor v GAA (Judgment and Sentence) ICTR-07-90-R77-I (4 December 2007)

The Prosecutor v Georges Ruggiu (Judgment and sentence) ICTR-97-32-I (1 June 2000)

*The Prosecutor v Jean Kambanda (*Appeal Judgment) ICTR 97-23-A (19 October 2000)

The Prosecutor v Jean Kambanda (Judgment and sentence) ICTR-97-23 (4 September 1998)

The Prosecutor v Joseph Nzabirinda (Sentencing Judgment) ICTR 2001-77-T (23 February 2007)

The Prosecutor v Juvénal Rugambarara (Sentencing Judgment) ICTR-00-59-T (16 November 2007)

The Prosecutor v Michel Bagaragaza (Sentencing Judgment) ICTR-2005-86-S (17 November 2009)

The Prosecutor v Omar Serushago (Decision Relating to a Plea of Guilty) ICTR- 98-39-T (14 December 1998)

The Prosecutor v Omar Serushago (Sentence) ICTR 98-39-S (5 February 1999)

The Prosecutor v Paul Bisengimana (Judgment) ICTR 00-60-T (13 April 2006)

The Prosecutor v Serugendo (Judgment and Sentence) ICTR-2005-84-I (12 June 2006)

The Prosecutor v Vincent Rutaganira (Judgment and Sentencing) ICTR-95-1C-T (14 March 2005)